

Cross-Border Financing Seminar Series

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**CROSS-BORDER FINANCING TRANSACTIONS
BETWEEN CHINA AND THE UNITED STATES**

- I. Foundational Laws for Cross-Border Financing Transactions
 - A. US Bankruptcy Code and UCC Article 9 (Secured Transactions)
 - B. PRC Enterprise Bankruptcy Law and PRC Property Law Part 4 (Collateral Rights)
 - C. PRC and US Choice-of-Law and Choice-of-Forum Rules
 - D. US Bankruptcy Code and UCC Article 9 Fit Together as Single Integrated Area of Law
 - E. UNCITRAL Model Law on Cross-Border Insolvency
- II. Interaction of UCC and US Bankruptcy Law; Preemption Doctrine (Supremacy Clause)
 - A. Article I, Section 8 of the US Constitution says:

“Congress shall have the Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”

 - US federal (national) government has only powers delegated by US Constitution
 - Only state governments have comprehensive powers
 - Laws passed by US Congress beyond grant of power in US Constitution will be struck down by US Supreme Court
 - B. Article VI, Clause 1 of the US Constitution says:

“[T]he Laws of the United States which shall be made in Pursuance [of this Constitution] . . . shall be the supreme Law of the Land.”

- C. Uniform Commercial Code (“UCC”) is state law enacted by state legislatures.
- D. US Bankruptcy Code (“US Bankruptcy Code”) is federal law enacted by US Congress within its Constitutional authority.
- E. When US Bankruptcy Code and UCC conflict, US Bankruptcy Code “preempts” the UCC
- F. US Bankruptcy Code gives special rights to holder of “allowed secured claim”
 - In deciding if creditor holds an “allowed secured claim,” US Bankruptcy Law relies on UCC to determine whether security interest:
 - was effectively created
 - properly perfected
 - is senior to judgment lien creditor
 - Secured claim treated as constitutionally protected “property interest”
 - Unsecured claim merely “debt” or “contract right” subject to discharge
- G. PRC Enterprise Bankruptcy Law (“China BR Law”) looks to PRC Property Law to determine whether creditor is “holder of security right over a specific property of the debtor” (Article 82 of China BR Law)
 - Wuxi Suntech bankruptcy shows importance of determination of secured status

III. Wuxi Suntech Power: Case Study of Bankruptcy

- A. Wuxi Suntech Power Co. Ltd. (“Wuxi China”) formed as Sino-foreign JV in 2001 (See corporate structure in Exhibit A-1)
- B. In preparing for IPO, owners of Wuxi China formed
 - Suntech Power Holdings Co. Ltd., a Cayman Islands company (“Suntech Holdings”)
 - Power Solar System Co. Ltd, a British Virgin Islands company (“Suntech”)

BVI)

- C. Suntech Holdings became sole shareholder of Suntech BVI
- D. Suntech BVI became sole shareholder of Suntech China and many other subsidiaries inside and outside China
- E. In 2005, Suntech Holdings issued shares on New York Stock Exchange
- F. Wuxi China accounted for 95% of production capacity of all Suntech affiliates ("Suntech Group")
- G. At time of IPO in 2005, initial market capitalization of Suntech Holdings was US\$2 Billion
 - By 2007, market capitalization reached US\$16 Billion.
- H. Suntech Group became world's largest supplier of photovoltaic cells and solar modules for generating solar power with 20,000 employees in many countries.
- I. To finance expansion, Suntech Holdings borrowed money by issuing Convertible Senior Notes ("Notes") (See Exhibit A-1)
 - Notes governed by Indenture governed by New York
 - Forum selection under Indenture was New York courts
- J. Following global financial crisis, international demand for solar products declined.
- K. In March 2013, Suntech Holdings defaulted on its obligation to redeem US\$541 million of Convertible Senior Notes. (See Exhibit A-2 for timeline of Suntech bankruptcy)
 - First major international default by PRC-owned enterprise
- L. Suntech Holdings tried to negotiate restructuring with Noteholders to defer repayment
- M. In October 2013, group of Noteholders obtained judgment against Suntech Holdings in US District Court for Southern District of New York
 - Noteholders then filed involuntary Chapter 7 bankruptcy petition against Suntech Holdings in New York Bankruptcy Court
- N. To stop US bankruptcy, Suntech Holdings started insolvency proceeding under

Cayman Islands law

- November 2013, Grand Court of Cayman Islands appointed joint provisional liquidators (“JPLs”) for Suntech Holdings
- JPLs effectively took control of Suntech Holdings
 - Conflict between JPL control under Cayman insolvency law and Chapter 7 Trustee under US Bankruptcy Law
- January 2014, Suntech Holdings, its JPLs and certain Noteholders entered into Restructuring Framework Agreement (“RFA”)
 - RFA required debt restructure arrangement to be implemented in Cayman Islands with ancillary Chapter 15 of US Bankruptcy Code
 - RFA rejected restructuring of Suntech Holdings in China
- February 2014, JPLs of Suntech Holdings filed petition to start ancillary proceeding in New York under Chapter 15 of US Bankruptcy Code
 - allow restructuring under supervision of Cayman Court
 - protect US assets of Suntech Holdings from attacks by individual creditors
 - Chapter 15 added to US Bankruptcy Code in 2005 to implement UNCITRAL Model Law on Cross-Border Insolvency (“UN Model Law”)
 - See Exhibit A-3 for list of countries adopting laws to implement UN Model Law. (China has not yet done so.)
- California-based creditors opposed Chapter 15 proceeding alleging “manipulation” of the Center of Main Interest (“COMI”) from China to Cayman Islands
 - COMI presumed to be jurisdiction of incorporation of debtor (absent evidence to contrary)
 - Suntech Holdings conducted no activities in Cayman Islands
 - Principal executive offices in China
 - New York Bankruptcy Court found China was COMI

when Cayman winding-up petition filed

- Commencement of Cayman winding-up shifted management of Suntech Holdings to JPLs in Cayman
 - JPLs took control of Suntech Holdings assets (stock certificates of Suntech BVI)
 - Despite opposition, New York Bankruptcy Court granted petition for Chapter 15 protection in November 2014
 - Court decided Cayman Islands was COMI
 - Cayman winding-up was “foreign main proceeding” under Chapter 15
 - Automatic stay immediately effective to halt creditors’ collection efforts
 - Suntech Holdings opened single bank account in New York to give US Bankruptcy Courts jurisdiction so Chapter 15 ancillary proceeding could be filed in US
 - Court noted intentional move of COMI from China to Cayman but purpose considered legitimate to achieve winding up of Suntech Holdings
- O. November 2013, Suntech BVI filed liquidation proceeding under BVI Insolvency Act.
- P. March 2013, immediately after Note default, Wuxi China applied for reorganization under Part Eight of PRC Bankruptcy Law. (See timeline in Exhibit A-2)
- People’s court where Wuxi China is “domiciled” has jurisdiction (Part One, Article 3 of PRC Bankruptcy Law)
 - PRC bankruptcy proceeding affects debtor’s property outside China (Part One, Article 5 of PRC Bankruptcy Law)
- Q. Wuxi Intermediate People’s Court accepted application and formed “liquidation committee” to act as Administrator.
- R. Administrator arranged for valuation of assets and creditor claims of Wuxi China.
- Noteholders of Suntech Holdings not treated as creditors of Wuxi

Suntech.

- S. Wuxi China Administrator negotiated with several companies about buying Wuxi China.
- T. JPLs of Suntech Holdings (indirect parent) and Liquidators of Suntech BVI (direct parent) played no role in negotiations.
- U. Reorganization Plan Wuxi China was proposed.
 - Shunfeng Photovoltaic International to acquire all shares of Wuxi China.
- V. Under Wuxi China Reorganization Plan:
 - Shareholders of Wuxi China paid nothing
 - Secured creditor received 100% of their claims
 - Unsecured creditors were paid 32% of their claims
- W. All classes of creditors other than Suntech BVI (shareholder) voted to approve Plan
 - Wuxi Intermediate Court approved the Plan as fair and equitable because value of the shares was zero
- X. Under Article 87, Court may approve Reorganization Plan without approval of all classes if:
 - Secured creditors fully paid and compensated for delay
 - Claims for wages and taxes fully paid
 - Payment to unsecured creditors (“ordinary claims”) exceeds amount that would be received in a liquidation
 - Adjustment rights of shareholders is fair and equitable
 - Priority of rights of individual creditors within a class not prejudiced
 - Reorganization Plan is “workable”

IV. Lessons learned from Wuxi Suntech bankruptcy

- A. Creditors at different levels of corporate structure have different rights
1. Suntech Holdings sole assets are shares of Suntech BVI
 2. Suntech BVI sole assets are shares of Wuxi China
 3. Recourse to assets of Wuxi China requires claim directly against Wuxi China
 4. International Noteholders of Suntech Holdings have no claim against assets of Wuxi China.
 - Only through liquidating dividend by Wuxi China to PSS and by PSS with Suntech Holdings
 - Risk of relying on consolidated financial statement of Wuxi Holdings when extending credit
 5. Difference between market capitalization and creditworthiness
 - Stock price based forward-looking expectation of growth in revenues of entire Suntech Group
 - Creditworthiness based on historic revenues, net worth and current assets
- B. Difference in risk of equity and debt
1. No fixed obligation to pay dividends to equity holder (common or preferred shares)
 2. Fixed obligation to debt holders
 3. Immediate dramatic effect of default
 - Cross-default clauses to other financing contracts
- C. Forum selection to file bankruptcy (“forum shopping”)
1. Under US law, four options to file “main” bankruptcy (28 USC §1408)
 - State of incorporation of debtor
 - Location of principal place of business of debtor
 - Location of substantial assets of debtor

- Location of pending bankruptcy of affiliate of debtor
2. Bankruptcy or insolvency proceedings started in China, BVI, Cayman Islands
 - Ancillary (non-main) case started in US under Chapter 15 of US Bankruptcy Code to stay actions by creditors against assets located in US
 - US courts have discretion to extend "additional assistance" in connection with a foreign proceeding under Chapter 15
 3. Automatic stay to prevent disorderly seizure (see discussion below)
 4. Different treatment of secured and unsecured claims (see discussion below)

V. Hypothetical Case Study

- A. Shanghai-based solar panel company, China Bright Dragon, LLC ("CBD") forms a wholly-owned Delaware corporation called American Bright Dragon, Inc. ("ABD").
 - ABD acquires shares of US-based solar panel company, Proud Eagle, Inc., a Washington state corporation ("PE").
- B. PE manufactures and sells solar panels.
 - PE's factory is in small town in Oregon and its chief executive office is in Seattle, Washington.
- C. PE imports solar cells and other raw materials from China and holds them at factory until manufactured into solar panels. (See Exhibit B)
 - PE also imports finished-product solar panels from CBD
- D. After manufacturing solar panels, PE holds finished solar panels in two warehouses located near the factory in Oregon.
 - One private warehouse owned by PE
 - Other is public warehouse operated by independent warehouse company (See Exhibit B-1)
- E. PE's customers are in US, Canada, the UK and Europe.
 - US customers pay for solar panels in US Dollars

- Canadian customers pay Canadian Dollars
 - UK customers pay in Pounds Sterling
 - European customers pay in Euros. (See Exhibit B-1)
- F. Customers in each country following payment options:
- lease solar panels from PE for five-year lease terms ("Leases")
 - buy solar panels under purchase agreements allowing payment in installments over five years with PE retaining title to solar panels until customer pays in full (conditional sale contracts) ("CSKs")
 - buy solar panels on "open account" by paying the full purchase price 90 days after delivery ("Accounts") (See Exhibit B-1)
- G. CBD wants PE to operate as profitable independent subsidiary without relying on CBD's credit strength.
- PE needs revolving line of credit from US-based bank ("Bank")
 - CBD will not guaranty PE loan
 - ABD has no assets or income so ABD guaranty not sufficient
- H. Bank is willing to provide line of credit only if PE grants Bank security interest in all of PE's inventory and receivables.
- Bank will insist on legal opinion from PE's counsel regarding creation, perfection and priority of Bank's security interest
- VI. Cross-Border Inventory Financing
- A. Uses and Availability of Inventory Working Capital Line
1. Working Capital Needs
 - a. PE will have many working capital needs in operating its business including paying employees, suppliers, marketing expenses, product development, taxes, etc.
 - b. "Working capital" is different from "capital expenditures" such as buying real property or equipment.
 2. Timing Mismatch Between Income and Expenses
 - a. Timing of PE's receipt of revenue from sales of inventory and collection of receivables may not match its obligations

D. Eligible Inventory; Borrowing Base

1. Borrowing Margin

- Maximum amount Bank will lend to PE will be percentage (often about 70%) of value of PE's "Eligible Inventory."
- That percentage is referred to as the "borrowing margin."

2. Valuation of Eligible Inventory

- Value of PE's Eligible Inventory will be "the lesser of cost or market" which is valuation under US GAAP
- "Cost" of Eligible Inventory is amount PE spent to buy or manufacturer it
- "Market" refers to "fair market value" of Eligible Inventory
 - Amount willing buyer will pay to willing seller in orderly sale

3. Calculation of Borrowing Base

- Value of PE's Eligible Inventory multiplied by 70% borrowing margin referred to as the "Borrowing Base"

E. Location and Market Value of Solar Panels

1. Manufacturer and Location of Inventory

- PE's inventory consists of solar panels manufactured in China by CBD or in US by PE
 - Some inventory in warehouses in China
 - Some on ships en route to US
 - Some is in PE-owned or public warehouses in the US
- Bank allows inventory in Borrowing Base only if Bank can:
 - perfect its security
 - ensure priority

- have reliable and cost-effective means to enforce

2. Fluctuation in Market Value of Inventory

- Market value of solar panels has fluctuated greatly in the past 8 years
- Solar panels now sell for about 20% of their sale price in 2009

F. Borrowing Base Certificate; Reduction in Borrowing Capacity

1. Each month, PE gives Borrowing Base Certificate to Bank showing value of Eligible Inventory
2. Amount available to borrow is tied to lower of cost or market of Eligible Inventory
 - each decline in market value of solar panels reduces amount available to borrow

G. Requirement of Perfection of Security Interest

1. To qualify as Eligible Inventory, solar panels must be subject to first-priority perfected security interest in favor of Bank
2. See discussion below on creation of security interest, perfection and priority

VII. Article 9 of Uniform Commercial Code; Comparisons with PRC Property Law

A. Nature and History of UCC

1. Uniform State Law

UCC is a “uniform law” developed by two non-governmental organizations:

- the American Law Institute (ALI)
- National Conference on Commissioners of Uniform State Laws (NCCUSL).
- ALI and NCCUSL composed of commercial law scholars, judges and lawyers (not law makers).

2. Enacted by State Legislatures
 - New Article or amendment of UCC becomes law when enacted by state legislature
3. UCC Official Comments
 - ALI and tNCCUSL publish “Official Comments” to UCC explaining statute and give examples.
 - Official Comments not part of the statute but greatly influence how the courts interpret the UCC.

B. Scope of UCC

Articles of UCC relevant to financing of PE

1. Article 1 – General Provisions
2. Article 2 – Sales
3. Article 2A – Leases
4. Article 3 – Negotiable Instruments
5. Article 5 – Letters of Credit (tangible and electronic)
6. Article 7 – Documents of Title (tangible and electronic)
7. Article 9 – Secured Transactions

C. Article 9 of Uniform Commercial Code; Comparisons with PRC Property Law

1. Unification of Security Devices
 - Article 9 of the UCC first adopted in 1962.
 - Combined many state laws covering various types of “security devices”
2. All Security Devices Included within “Security Interest”
 - Historical security devices included chattel mortgages, pledges, security assignments, hypothecations, etc.
 - UCC refers to all types of security devices as “security interests.”

- PRC Property Law distinguishes between “mortgages”, “pledges” and “assignments.”

D. Scope of Article 9 of UCC (UCC §9-109)

1. Based on Function Rather than Form

- a. A transaction, regardless of its form, that creates a “security interest” in personal property . . . by contract. (UCC §1-201(35))
- b. “Security interest” means an interest in personal property . . . which secures payment or performance of an obligation. (UCC §1-201(35))
 - Effects of characterization as “security interest”
 - Remedies available to secured party (lender, buyer, lessor) against debtor (borrower, seller, lessee)
 - Lenders/secured parties try to avoid UCC’s protections for borrowers/debtors
 - Rights against third-parties and requirement to perfect
- c. Example: True sale (compared with pledge) Physical delivery of gold bars worth USD 10,000
 - True sale of gold bars
 - Title of contract is “Purchase and Sale Agreement”
 - Buyer pays Seller USD 10,000
 - Risk of loss or decline in value borne by Buyer
 - Benefit of increase in value enjoyed by Buyer
 - Buyer has no recourse to Seller as long as Seller actually had power to transfer title (Seller had not stolen gold bars)
 - Seller has no right or obligation to repurchase
 - Buyer acquires “all right, title and interest” in gold bars

- Buyer never returns gold bars to Seller
- “Security interest” in gold bars
 - Lender lends USD 10,000 to Borrower
 - Borrower promises to repay loan in one year plus per annum interest at 10% (i.e. USD 1,000)
 - Borrower delivers gold bars to Lender as collateral to secure repayment of loan plus interest
 - Borrower signs Promissory Note and Security Agreement with promise to pay and grant of security interest
 - Lender has “security interest” in golds bars
 - Upon Borrower default, Seller can give notice to Borrower and conduct UCC foreclosure sale
 - Seller may sell gold bars to third-party at public auction or purchase at public auction by making highest bid
- Hybrid True Sale and Security interest
 - Seller has obligation to repurchase gold bars after one year for USD 11,000
 - Upon repurchase, Buyer to deliver gold bars back to Seller
 - Seller has option to repurchase gold bars after one year for USD 11,000
 - If market price of gold increases, Buyer must pay amount of increase to Seller
 - If market price of gold decreases, Seller must pay amount of decrease to Buyer
 - Buyer is assured of receiving USD 11,000 (price of gold bars plus payments) after one year
 - Is Seller or Buyer “owner” of gold bars? Which party has various “indicia of ownership”?

- Does it matter whether contract is called “Purchase and Sale Agreement” or “Security Agreement”? (“transaction . . . regardless of form”)

2. Compare Article 179 of PRC Property Law:

“Where debtor . . . mortgaged a property to the creditor without transferring ownership of the property for the purpose of securing the performance of a debt . . .”

E. Types of Personal Property

1. Borrower’s Use Determines Type

Type (category) of collateral depends on the debtor’s (borrower’s) use of the collateral.

2. Tangible Personal Property; “Goods”

a. “Goods” means all things that are movable when a security interest attaches.

- Also referred to as “chattels,” “moveables” or “tangible personal property”

b. “Inventory” is goods, other than farm products, which:

- Are held by a person for sale or lease
- Are furnished by a person under a contract of service
- Consist of raw materials, work in process or materials used or consumed in a business.
- Are leased by a person as lessor (UCC §9-102(48)).

DISCUSSION: Based on Exhibit B-1 (and your imagination):

- (i) which property is “inventory” of PE
- (ii) which property is “inventory” of ABD, and which property is “inventory” of CBD
- (iii) where is PE’s and CBD’s inventory located at different times
- (iv) which property under PRC Property Law matches the definition of “inventory” under UCC Article 9;

- Article 180 – “raw materials, semi-finished products and products”
- (v) under UCC Article 9, solar panels leased to PE’s customers are in what category of collateral?
- c. “Farm products” includes crops, livestock, supplies used in farming operations and products of crops and livestock in their unmanufactured state. (PE has none.)
- d. “Consumer goods” includes goods used primarily for personal, household or family purposes. (PE has none.)
- e. “Equipment” means all goods other than inventory, farm products and consumer goods.
- Includes equipment used to manufacture solar panels.
 - “Equipment” means goods other than inventory, farm products or consumer goods. UCC §9-102(33).
 - Residual category for goods.

DISCUSSION: Based on this Outline and Exhibit B-1 (and your imagination):

- (i) which property is “equipment” of PE
- (ii) which property is “equipment” of ADB
- (iii) which property is “equipment” of CBD
- (iv) where is PE’s, ABD’s and CBD’s equipment located
- (v) which property under PRC Property Law matches the definition of “equipment” under UCC Article 9?
- Article 180 – “manufacturing facilities, vessels, aircraft, transportation vehicles
- f. PRC Property Law allows a mortgage on “other property” for which mortgage is not prohibited (Article 180)
- “other property” is not included in provision authorizing “after-acquired property” (Article 181).
- g. Under UCC Article 9 and PRC Property Law, what categories of property are PE’s computers, operating manuals for computers, financial records, boxes of photocopy paper?

3. Pure Intangible Personal Property

- a. “Accounts” includes rights to receive payment of money for property sold, leased or licensed. UCC §9-102(2).

DISCUSSION: Based on this Outline and Exhibit B-1 (and your imagination):

- (i) which property is “accounts” of PE
 - (ii) which property is “accounts” of ADB
 - (iii) which property is “accounts” of CBD?
 - (iv) Compare the meaning of “accounts receivable” under Article 223 of the PRC Property Law with the definition of “accounts” in UCC §9-102(a)(2).
 - Also see definition of “accounts receivable” in PBOC regulations.
- b. “Deposit Accounts” includes various types of bank accounts.
- c. “Commercial Tort Claims” includes tort claims by companies or by individuals that arose in the course of his/her business.
- libel claim based on false statement about the safety of PE’s solar panels
- d. “General Intangibles” includes all personal property that does not fall within another UCC category.
- “General intangibles” is residual category for intangible property just as “equipment” is residual category for tangible property. (Residual category for all personal property.) UCC§9-102(42).
 - PE’s intellectual property rights.
 - Partner’s rights under a partnership agreement or a members rights under an LLC.
 - Chinese airlines’ right to take delivery on an aircraft. (See Exhibit E)
 - Right to receive payment under a loan agreement.
- e. DISCUSSION: Compare types of “pure intangible” property with similar PRC Property Law categories. See Article 223 of PRC Property Law.

- Which UCC category would the types of property listed in Article 223 fall into?
 - Does Article 223 include a “residual category” similar to “general intangibles” under the UCC?
- f. Section Two of PRC Property Law entitled “Pledge of Rights” (Articles 223 – 229) includes no reference to “after-acquired” pledged property.
- g. PBOC regulations contemplate after-acquired pledge of rights but see discussion below about registration of after-acquired pledge of rights with PBOC filing office.
4. Semi-intangible Property
- a. “Instruments” includes promissory notes and drafts (including bank checks). UCC §9-102(47).
- PE customers pay by bank check or give PE promissory note
 - Definition and legal characteristics of “instruments” governed by Article 3 of UCC
 - Legal characteristics of pledges (grant of security interests) of instruments are governed by Article 9 of the UCC
 - Compare Article 223 of PRC Property Law which covers: bank drafts, checks, promissory notes, bonds and certificates of deposit
- b. “Chattel Paper” includes leases, conditional sale contracts and other written contracts that include an obligation to pay “money and a security interest in specific goods.” UCC §9-102(11).
- PE Leases and CSKs of solar panels with its customers
- c. “Documents” includes bills of lading and warehouse receipts. UCC §9-102(30)
- PE may be “consignee” under bill of lading for solar panels or raw materials on ship from China to US. See Exhibit B.

- Party entitled to take control under warehouse receipt issued by public warehouse where PE holds solar panel waiting for shipment to customers. See Exhibit B.
- Article 223 of PRC Property Law covers warehouse receipts and bills of lading.

F. Creation of Security Interests

1. Creation of a security interest under Article 9 is called “attachment”
2. Requirements for attachment (UCC §9-203):
 - a. Value is given (For example, Bank’s loans or commitment to make loans)”
 - b. Debtor (PE) has “rights in the collateral” or “power to transfer rights”
 - c. One of the following conditions is met:
 - Debtor has “authenticated” a security agreement with a description of the collateral
 - Secured party takes possession of tangible or semi-tangible collateral
 - A certificated security in registered form of “delivered” to the secured party under UCC Article 8
 - Secured party takes “control” deposit accounts, electronic chattel paper, etc.
3. DISCUSSION: Under Articles 187, 188 and 189 of the PRC Property Law, when is a mortgage created?
 - For real estate-related mortgages, upon registration
 - For equipment and inventory, when mortgage becomes effective (upon signing)
 - Unregistered mortgage not effective against bona fide third parties (“BFTP”).
 - Who is a “BFTP”?
 - Is Bankruptcy Administrator a BFTP?
 - Will mortgagee under unregistered inventory or equipment mortgage be secured creditor under China BR Law?

4. DISCUSSION: Under Article 224 of the PRC Property Law, when is a pledge created?
 - Created upon delivery of “proof of rights”
 - If no proof of rights, creation upon registration
 - Compare with semi-intangible property under UCC
 - When does a pledge become effective against bona fide third parties?

G. Perfection of Security Interests

1. General Rule: file “financing statement” in UCC filing office where debtor is “located”
 - a. Information that must be included in financing statement
 - i. Name of the debtor (PE). Must be legal name.
 - ii. Name of the secured party (Lender)
 - iii. “Indicates the collateral covered by the financing statement”
 - Sufficiency of description of collateral (9-108)
 - Specific listing, category, “type” of as defined in UCC
 - b. No debtor signature required. Secured party has authority to file financing statement based on the signed Security Agreement.
 - c. Basic Rule for determination of “location” of debtor
 - i. State of incorporation (or other formation) for US registered organizations.
 - ii. Principal place of business or chief executive office for other business debtors
 - iii. Place of residence for individuals
2. Registration under PRC Property Law. Compare with general rules for registration of security interest under the PRC Property Law
 - a. For most mortgages, register with AIC where debtor’s registered office is located.
 - b. For most pledges, register with PBOC national filing system.

DISCUSSION: Describe the AIC and PBOC registration systems and which types of collateral covered by each system. Are the AIC and PBOC registration systems “generally available” to the public?

3. Other Methods of Perfection UCC

- a. Perfection by filing under federal statute, e.g. security interests in U.S. registered aircraft by filing with Federal Aviation Administration and UN Capetown Convention
- b. Perfection by filing under federal Copyright Act for security interests in federally registered copyrights
- c. Perfection by notation of lien on motor vehicle certificate of title under state vehicle registration statute
- d. Perfection by “control” of deposit accounts, letter of credit rights and electronic documents or chattel paper
- e. Possession of tangible negotiable instruments, documents or chattel paper

4. Other Methods of Perfection under the PRC Property Law

DISCUSSION: How are pledges of intellectual property registered under Article 227 of the PRC Property Law?

H. Priority of Security Interests

1. First to File

- General rule for competing interests perfected by filing: first-to-file

2. Chattel Paper Lender vs. Inventory Lender

- Purchaser of chattel paper has priority over competing inventory lender if purchaser takes possession of chattel paper without notice that chattel paper has been assigned to another identified assignee (UCC §9-330(a))
 - Lender with security interest in inventory also has security interest in receivables (including chattel paper) as “proceeds”

3. Chattel Paper Lender vs. Other Chattel Paper Lender

Purchaser of chattel paper has priority over competing chattel paper financier if:

- purchaser takes possession of the chattel paper
- without notice that purchase violates rights of other chattel paper lender (UCC §9-330(b)
 - direct financing of receivables rather than indirect interest as “proceeds”

4. Letter of Credit Rights.

Priority of security interest perfected by “control” of letter of credit rights over security interest perfected by filing. (See Exhibit F)

I. Choice of Law

1. Creation of Security Interest

- Parties can choose law of any jurisdiction that bears a “reasonable relation” to transaction. (UCC §1-301)

2. Perfection and Priority of Security Interest

- Law governing perfection and priority of security interest is designated in §§ 9-301 through 9-307 of Article 9.

3. Protection of Third Parties

- Rationale is that perfection and priority affect rights of third parties who do need to know where to search for UCC filings.

4. PRC Choice of Law

a. Compare with choice-of-law rules for creation and perfection under PRC Property Law

b. Place to file chattel mortgage or pledge is stated in statute

- AIC or PBOC where debtor’s registered office located
- CBD’s registered office located in Shanghai
- PE has no registered office in China

○ Where could Bank of America register its mortgage against inventory owned by PE in China?

c. Law governing effectiveness of mortgage (creation) governed by general PRC choice-of-law rules

- Foreign law can govern Security Agreement between PE and Bank because contract has “foreign element”
 - Only connection with China is location of inventory in China and Chinese use of PRC courts to seize inventory
 - Chinese court should apply UCC to decide creation of security interest
- e. Would PRC court look to UCC to determine perfection and priority of competing claims in PE collateral in China?
 - PRC choice-of-law rules may apply only “internal law” of Washington state; or
 - PRC choice-of-law rules may apply entire law of Washington state, including Washington choice-of-law rules
 - If so, PRC court will determine perfection based on UCC rules on “location” of debtor (PE)

VIII. Remedies and Enforcement

- A. Secured parties can enforce security interest through court procedures. (UCC §9-601(a))
- B. Secured parties can take possession of collateral without going to court but cannot “breach of the peace.” (UCC §9-609)
- C. Secured party can notify account debtor “to make payment or otherwise render performance” to secured party. UCC§9-607(a) (See Exhibit E)
- D. Under PRC Law, mortgages or pledges can be enforced only through court procedures.

IX. U.S. Bankruptcy Code; Comparison with PRC Bankruptcy Law

- A. Automatic Stay
 - 1. Immediate Halt to Collection Activity
 - Secured party must stop all collection activity against debtor immediately upon filing of bankruptcy petition (§362 of U.S. Bankruptcy Code)
 - US Bankruptcy stay preempts remedies under UCC or in Security Agreement

2. Stay Applies to Any Stage of Foreclosure
 - Foreclosure of security interest must immediately stop regardless of stage in process
 - Stay of foreclosure auction before sale is complete
3. Exception to Stay to Allowing Netting in Swap Transactions
 - Exercise of setoff rights must stop with an exception important to swap transactions
 - Where offset or “netting” of counterparty transaction can occur notwithstanding the bankruptcy. US Bankruptcy Code §362(b)(6).
 - No stay of recoupment (adjustment under same contract)

3. Automatic Stay under PRC Bankruptcy Law

DISCUSSION: Compare to secured parties’ collection rights under PRC Bankruptcy Law with automatic stay

- Actions between filing and acceptance of bankruptcy petition
- No exception for set off or netting swap contracts

B. Status of Secured Claims in Bankruptcy

1. Allowed Secured Claims

- Secured lender must establish in US Bankruptcy Court that its claim against PE is an “allowed secured claim.” (US Bankruptcy Code §506; Article 49 of China BR Law)

2. Proof of UCC Creation (Attachment)

- Secured lender must prove that security interest was effectively created under the UCC (i.e. security interest “attached”)

3. Bankruptcy Law Incorporates UCC

- US Bankruptcy Code “preempts” UCC to extent of any inconsistency
 - US Bankruptcy Code expressly looks to UCC to determine creation, perfection and priority of security interest

4. Setoff Rights Create Secured Claim

- Creditor with common law setoff right against debtor also has “allowed secured claim”
- Borrower’s bank account held by Bank creates common law set off rights

5. Secured Creditor vs. Unsecured Creditors

- a. Creditor that holds allowed secured claim is referred to as “secured creditor”
- b. Other creditors are referred to “unsecured creditors”
- c. Rights of secured creditor under US Bankruptcy Code much greater than those of an unsecured creditor
 - Adequate protection
 - No impairment of claim under Plan of Reorganization
 - Compare treatment of secured and unsecured claims under Suntech China bankruptcy

6. Bifurcation of Partially Secured Claims

- If secured creditor’s collateral is worth less than amount of its claim
 - Creditor has secured claim in amount of collateral
 - Unsecured claim for amount in excess of amount of collateral.

7. Bifurcation of Partially Secured Claims under China BR Law

DISCUSSION: How does PRC Bankruptcy Law treat “under-secured claims.” See Sections 109 and 110 of PRC Bankruptcy Law. How does the court determine value of collateral or secured and unsecured amounts of the claim?

- a. To extent secured obligation cannot be fully repaid from collateral, creditor has “ordinary claim” (unsecured) for unpaid amount
- b. Analogous to bifurcated secured and unsecured claims of under-secured credit under U.S. Bankruptcy Code.

8. Secured creditor entitled to “adequate protection” of allowed secured claim but not unsecured claim.
 - If value of collateral is decreasing, secured creditor is entitled to adequate protection payments.
 - Substitute collateral may be ordered by BR Court only if it is “indubitable equivalent” of original collateral. (US Bankruptcy Code §361; Article 75 of China BR Law.)
 - “Adequate protection” to compensate for decline in value resulting from stay (US Bankruptcy Code §362(b)(6); See Article 75 of China BR Law)
- C. BR Trustee or Debtor-in-Possession (“DIP”); Power to Borrow “Post-Petition”
1. Trustee
 - a. When debtor files Chapter 7 bankruptcy to liquidate, BR Trustee automatically appointed
 - b. BR Trustee is independent third party that takes over control of debtor’s operations
 - c. Trustee in US bankruptcy proceeding is similar to “Administrator” under China BR Law.
 - d. US Bankruptcy Code grants certain “powers” to Trustee, including power to “avoid” certain transfers and liens and reject burdensome contracts
 2. Debtor-in-Possession
 - a. When debtor files Chapter 11 bankruptcy to reorganize, debtor becomes Debtor-in-Possession (“DIP”)
 - There will be no Trustee unless specially appointed by BR Court at request of creditors.
 - b. DIP has same powers BR Trustee except those powers exercised by DIP’s Board of Directors and Officers
 - References in these materials to “BR Trustee” include DIP
 - Compare to powers of JPLs and Board under Suntech’s Cayman insolvency proceeding

- Compare debtor's right to management reorganization with powers of Administrator (Article 73 of China BR Law)

3. DIP Lending

- a. DIP has power to borrow money "in the ordinary course of business" unless court orders otherwise (i.e. no court approval is required). (US Bankruptcy Code §364(a))
 - PE can continue to buy solar panels or raw materials on open account
- b. DIP can obtain unsecured credit not "in the ordinary course of business" with court's approval "after notice and hearing" (US Bankruptcy Code §364(b))
 - PE can borrow money from CBD or Chinese banks without collateral
- c. If DIP cannot obtain unsecured credit, then it can obtain secured credit with court approval:
 - On unencumbered property
 - PE's factory or equipment
 - On property that is subject to existing lien if lender's lien is junior.
 - Junior security interest on inventory and receivables (US Bankruptcy Code §364(c))
- d. If DIP cannot obtain credit secured by junior lien, DIP can obtain secured credit senior to existing lien
 - security interests of secured creditors must be "adequately protected" (US Bankruptcy Code §364(d))
 - Senior lien under §364(d) referred to as "priming lien"
 - One of DIP's strongest rights when negotiating against secured lenders prior to bankruptcy in "loan work-out" negotiation

- f. During reorganization, Administrator may borrow money secured by debtor's property (Article 75 of China BR Law)
- g. China BR Law does not specify whether Administrator can grant "priming lien" on collateral
 - DISCUSSION: What is the scope of the Administrator's power to borrow money secured by the debtor's property? What are the limits on that power? (See Article 69 of China BR Law)
- h. Administrator's general power to incur secured debt likely to have similar effect in absence of detailed regulations to the contrary.
- j. In US, certain lenders specialize in DIP lending.
 - Sometimes involuntary lending by pre-petition lender

D. Avoidance Powers of Bankruptcy Trustee

1. US Bankruptcy Trustee has three core avoidance powers:
 - strong-arm avoidance (US Bankruptcy Code §544)
 - avoidance of preferential transfers (US Bankruptcy Code §547)
 - avoidance of fraudulent transfers (US Bankruptcy Code §548)
2. Rejection of burdensome "executory contracts and unexpired leases"
 - Executory contract is contract with material remaining performance by both parties
 - Trustee reviews debtor's executory contracts and unexpired leases and decides whether to assume or reject them (US Bankruptcy Code §365)
 - Rejection of collective bargaining agreements with labor unions
 - Rejection of unfunded pension obligations (General Motors, City of Detroit)
3. Extent of Trustee's ability to avoid transfers and reject burdensome contracts may determine ability of debtor to reorganize and of

creditors to receive recovery

E. Strong-arm Avoidance Power

1. Avoid Unperfected Security Interests

- “Strong-arm power” to avoid unperfected security interests under US Bankruptcy Code §544.

2. Hypothetical Lien Creditor

- a. Section 544(a)(1) gives Trustee’s powers of creditor that obtains judicial lien against debtor’s property on date of bankruptcy petition
- b. Power is called “hypothetical” because Trustee has power regardless of whether any such creditor actually exists.
- c. Judicial lien creditor has priority over unperfected security interests. Therefore, Trustee can avoid such interests.

3. Unperfected Security Interests under China BR Law

China BR Law does not expressly grant Administrator power to avoid unperfected security interests but power may be implied by Property Law

- Unregistered mortgage on equipment and inventory not effective against “bona fide third party” (PRC Property Law – Articles 188 and 189)
- China BR Law silent on whether Administrator is “bona fide third party.”

F. Power to Avoid Preferential Transfers

1. US Bankruptcy Trustee’s Preference Avoidance Power

- US Bankruptcy Trustee can avoid transfers to creditor:
 - for antecedent debt (owing before transfer)
 - made during preference period
 - allows receiving creditor to improve its position as compare to liquidation. (US BR Code §547(b)).

2. PRC Administrator's Preference Avoidance Powers
 - Articles 31 and 32 of the Chinese BR Law give the Administrator a similar avoidance power.
3. Preference Avoidance Risks in Loan Workouts
 - New transactions not subject to avoidance because "contemporaneous exchange for new value"
 - Serious obstacle when restructuring existing transaction with financially weak counter party
 - Avoiding payment not in ordinary course
 - Avoiding new grants of security interests
4. Requirements for PRC Administrator's Preference Avoidance Power
 - a. Power to avoid transfer of security interest in debtor's property
 - For unsecured debt if made within one year prior to the court's acceptance of bankruptcy application
 - Implies "unsecured debt" is "antecedent debt"
 - b. Power to avoid security interests under clause 3 of Article 31 similar to preference avoidance power of US Bankruptcy Trustee
5. US Bankruptcy Code has 90-day Preference (Look-Back) Period
 - a. Creditor can improve position through additional collateral
 - Must wait out 90-day preference period in hopes that debtor will not file bankruptcy during that time period
 - b. One-year preference period for transfers to "insider" of debtor
 - Prolongs secured party's uncertainty
 - May impede further dealings between parties during that time

6. When Does “Transfer” Occur?

- a. To determine whether transfer of security is for existing unsecured debt or is given for new debt requires understanding of when “transfer” of security occurs
- b. “Transfer” occurs when it is perfected, i.e. cannot be defeated by a judicial lien creditor
- c. Similar logic should apply under Chinese BR Law
 - Transfer of security interest occurs when effective against third parties rather than between parties to mortgage

G. Power to Avoid Fraudulent Transfers

1. Constructive Fraudulent Transfers

- a. U.S. Bankruptcy Trustee also has power to avoid transfers and obligations:
 - made within two years prior to bankruptcy
 - if debtor financially stressed at the time of the transfer (or transfer caused financial distress)
 - debtor did not receive “reasonably equivalent value” in exchange. (US BR Code §548(1)(B))
- b. See discussion below regardless risk of fraudulent transfers challenge to upstream guaranties or leveraged buyouts

2. PRC BR Law Requires “Obviously Unreasonable Price”

- Administrator has power to avoid transactions:
 - entered into within one year prior to acceptance of the bankruptcy application
 - conducted at “an obviously unreasonable price”
 - Chinese courts may interpret that phrase in similar manner to “reasonably equivalent value”

3. Upstream and Cross-Stream Guaranties

- Debtors rarely transfer property or incur obligations without receiving something valuable in return (unless hiding assets)
- Fraudulent transfer challenge may arise with “upstream guaranty” or “cross-stream guaranty” (See Exhibit B-2)
 - Debtor’s obligations are supported by subsidiaries or other affiliates that do not themselves benefit from the transaction
 - PE guaranty of CBD or ABD debt
 - Suntech China guaranty of Suntech Holding debt (if such guaranty given)
- Parent company may cause subsidiary to guaranty parent’s obligations under transaction that benefits parent and but not subsidiary

4. Tests for Financial Distress

US Bankruptcy Trustee can show debtor was insolvent or financially stressed at time of upstream guaranty under one of three tests:

- a. Modified balance sheet test (“MBST”): debtor’s liabilities exceeded assets
 - Under GAAP, assets valued at book value
 - Under MBST, assets valued at “fair saleable value”
 - Under GAAP, contingent liabilities like guaranties generally do not appear on liability side of balance sheet
 - Under MBST, contingent liabilities given estimated amount based on likelihood of contingency
 - If PE pays under Guaranty, PE is entitled to reimbursement from ABD
 - Under GAAP, contingent assets not listed on asset side of balance sheet

- Under MBST, contingent assets given estimated value based on likelihood of contingency and financial strength of obligor
- b. Debtor could not pay its debts as they became due (liquidity test)
- c. Debtor was engaged in a business for which it had an unreasonably small capital (undercapitalization test).

DISCUSSION: Explain how upstream guaranty in Exhibit B-2 would cause PE to be insolvent under the “modified balance sheet test” referred to above. How should a court determine the value of PE’s assets and liabilities?

5. Fraudulent Transfers under PRC BR Law

- a. Unlike US Bankruptcy Trustee, PRC Administrator need not show that debtor was financially stressed
- b. Avoidance power applies only if debtor filed bankruptcy application within one year entering into the upstream guaranty
 - Timing implies financial distress

6. Reducing Fraudulent Transfer Risk under US Law

- a. Under U.S. practice, two basic ways to reduce risk upstream guaranty will be challenged as fraudulent transfer:
 - Ensure guarantor receives reasonable value in exchange for guaranty
 - Ensure that guarantor is not rendered insolvent by guaranty
- b. Document and recite direct and indirect benefits to guarantor
- c. Document and formalize contingent assets
 - Contribution Agreement among co-guarantors
 - Reimbursement Agreement between guarantor and borrower
- d. Savings clause in guaranty limiting maximizing liability to avoid

insolvency

e. Accountant “Solvency Letters” and Good Faith Exception

- To reduce risk that PE was rendered insolvent by the transaction, Lender may request:
 - “solvency letter” from third-party expert expressing view that none of three grounds for insolvency will exist after closing
- Insolvency letter will not control later court determination of whether PE was “rendered insolvent”
- Shows Lender in good faith believed PE would still be solvent immediately after closing
- With such good faith belief, recipient of transfer can, at least, retain transferred funds or rights to the extent of the value actually provided to transferor

X. Loan Workout Negotiations; Increasing Borrowing Base to Avoid Default

A. PE Inventory in Shanghai Warehouse

1. What Court will decide priority of claims to inventory?

a. US Bankruptcy Court in Seattle

- PE files bankruptcy in Seattle because principal place of business and state of incorporation
- Bank of America claims Shanghai warehouse inventory as part of collateral in proving “allowed secured claim”

b. Shanghai People’s Court

- Creditor of PE gets money judgment in Shanghai court unrelated to inventory
- Creditor asks assistance of Shanghai court to seize inventory
- Bank of America appears in Shanghai court and claims security interest in inventory

2. What law will Shanghai and Seattle courts apply to decide priority of competing claims?
 - a. Seattle Bankruptcy Court applies choice-of-law rules in Washington state UCC
 - Security Agreement between PE and Bank says it is governed by Washington state law
 - Loan transaction has “reasonable relationship” to Washington state so Seattle court honors choice of Washington state law (UCC §1-105)
 - Applying Washington state law (UCC), Seattle court will decide Security Agreement creates security interest in Shanghai warehouse inventory
 - PE must have “rights in the collateral” for security interest to “attach”
 - b. Shanghai court applies PRC choice-of-law rules
 - Security Agreement between PE and Bank says it is governed by Washington state law
 - Security Agreement has “foreign element” so Shanghai court honors choice of Washington state law
 - Applying Washington state law (UCC), Shanghai court will decide Security Agreement creates security interest in Shanghai warehouse inventory
 - PE must have “rights in the collateral” for security interest to “attach”
3. Determining When PE Acquires Title to Inventory Purchased from CBD (“rights in the collateral”)
 - Purchase Agreement between PE and CBD determines when title passes to PE (when PE acquires rights)
 - Purchase Agreement incorporates INCOTERMS
 - EXW: Ex Works (CBD Factory, Shanghai) or
EXW: Ex Works (Designated Warehouse, Shanghai)

- Delivery occurs and title passes at CBD factory's loading dock (or delivery to warehouse)
 - Warehouse issues "warehouse receipt" to PE
 - PE has rights in inventory in China warehouse and can grant security interest
 - FOB: Free on Board (Shanghai Port)
 - Delivery occurs and title passes when solar panel loaded on ship in Shanghai
 - PE has no rights in inventory in China and cannot grant security interest warehouse
4. How to Perfect Security Interest in Inventory in Shanghai Warehouse
- a. Seattle court applies UCC choice-of-law rules governing perfection of security interest
- Different from rules governing creation of security interest
 - General rule: jurisdiction where debtor (PE) is "located"
 - PE located in Washington state because incorporated in Washington state
 - US corporations, like PE, are "registered organizations"
 - Non-US corporations, like CBD, are "organizations" but not "registered organizations"
 - Local law of Washington state governs
 - Bank's financing statement filed in Washington state UCC office perfects security interest in Shanghai inventory
 - Exception: jurisdiction where warehouse receipt is located
 - When perfection is based on possession (rather

than filing), local law of jurisdiction where collateral is located governs

- b. Shanghai court may apply UCC choice-of-law rules to decide perfection
 - PE has no registered office in China so no AIC office would accept filing of Security Agreement
 - Washington state UCC office only option for filing
 - Article 223 of Property law allows perfection by “delivery of proof of rights”
 - negotiable warehouse receipt?
 - non-negotiable warehouse receipt issued to Bank?
 - Without delivery of proof of rights, pledge effective only upon “processing of pledge registration with the relevant authorities”
 - Bank can rely on perfection only by taking possession of warehouse receipts for inventory

B. PE Inventory on Ship En Route from China to US

- Same analysis warehouse inventory
- Document of title is bill of lading rather than warehouse receipt
- After ship leaves Shanghai, how can creditor seize it?

C. Additional Collateral from CBD

If CBD also owns inventory in warehouses in China or the US, PE may ask Bank of America to allow the CBD inventory to be added to the Borrowing Base.

D. UCC Choice-of-Law Rules for Non-US Debtors

1. Location and Place to File for non-US Corporations

- a. CBD is organized under PRC law
 - “Organization” but not “registered organization”

- b. Under the choice-of-law rules of the Washington State UCC, perfection of the CBD security interest will be governed by the laws where CBD is “located.”
 - c. As a general rule, a non-US debtor is “located” in jurisdiction of its chief executive office.
 - CBD is located in Shanghai
 - “Local law” of PRC governs perfection
- E. Perfection of Security Interests under PRC Property Law
- 1. Filing with AIC Where CBD is Registered
 - Non-possessory security interest in inventory perfected by registering in AIC office where debtor (CBD) is registered.
 - Pursuant to Property Law, AIC offices throughout China established filing systems to create public notice of security interests in inventory (among other property).
 - 2. Perfection of Security Interest under PRC Property Law
 - Security interest in inventory registered with proper AIC office “effective against third parties”
 - Cannot be avoided by Administrator under the PRC Bankruptcy Law
 - Cannot be defeated by third-party creditor on CBD
- F. Special Exception May Apply to CBD Inventory
- 1. Location of CBD under UCC
 - a. UCC rule that non-US organization located in jurisdiction of its chief executive office has important exception
 - b. If AIC filing system for security interests in inventory does not satisfy certain requirements stated in UCC, then CBD will not be “located” in Shanghai
 - CBD may be deemed to be “located” in Washington DC.
 - 2. Requirement of Availability to Public

- a. For CBD to be “located” in China, AIC mortgage registration system must:
 - “generally require information concerning the existence of a non-possessory security interest
 - to be made generally available in a filing, recording or registration system . . .
 - [to obtain] priority over rights of a lien creditor with respect to the collateral” (UCC §9-307(c))
- b. AIC filing system in some locations not open to public but only to those who could show their reason for searching the system
- c. For that reason, some commentators argue AIC filing system does comply with UCC requirements
- d. If AIC filing system not compliance, then CBD “located” in Washington DC
- e. Because of uncertainty whether AIC filing system UCC-compliant, most careful lenders would file both with applicable AIC and in Washington DC.

G. Legal Opinion on Perfection of Security Interest in CBD Inventory

1. Before Bank allows CBD Inventory to be added to Borrowing Base, it would require legal opinion stating that Bank’s security interest “duly perfected”
2. Because of uncertainty about which law governs perfection, separate opinions would be needed from CBD’s PRC and US counsel.

XI. Cross-Border Receivables Financing

A. Receivables Resulting from Sale or Lease of Solar Panels

1. PE provides financing or defers payment of purchase price through leases, installment sales contracts and open account trade credit
2. Under Article 9 of UCC, these receivables would be categorized as “chattel paper” or “accounts”

B. Inclusion of Eligible Receivables in Borrowing Base

1. PE may grant its lender a security interest in these receivables. To the extent they qualify as “Eligible Receivables,” they can be included in the Borrowing Base along with Eligible Inventory.
2. Like Eligible Inventory, Eligible Receivables will be multiplied by a borrowing margin (e.g. 80%) before being added to the Borrowing Base
3. Decline in credit quality of PE customers causes reduction in amount of Eligible Receivables

C. Addition of CBD Receivables to Borrowing Base

1. Inventory and Receivables Perfected by Filing in UCC Office
 - Much of the discussion above about supplemental inventory applies equally to supplemental receivables of CBD
2. Under PRC Property Law, Inventory and Receivables Perfected under Difference Filing Systems
 - a. System for perfection of security interests in receivables under PRC Property Law is different.
 - b. Rather than AIC, PBOC created single nationwide filing system for perfecting pledged receivables
 - c. Potential gaps in PRC Property Law’s treatment of pledges of receivables:
 - No mention that registered receivable pledges effective against third parties
 - No residual category of intangible collateral similar to “general intangibles” under the UCC
 - d. Potential gaps underscores need to file receivable pledges both with PBOC and in UCC Filing Office in Washington DC

D. Securitization of Receivables

1. PE may elect to “securitize” its receivables by transferring them to “bankruptcy remote” affiliate which sells interests in the pool of receivables.
2. Chinese government encouraging securitization of receivables in

recent years

- Mismatch between demand for mortgage finance and deposit base

3. Role of securitization in Global Financial Crisis

F. Structure of Securitization

See Exhibit D-1 for a Diagram of Receivables Securitization Structure common in the US)

G. Legal Issues Raised by Securitization Transaction

Securitization of receivables entail several specialized legal and credit issues, including the following:

1. Bundling and Segmentation of Receivables for Securitization

PE's "portfolio" of receivables has various characteristics. Methods of mitigating risks.

a. Match interest rate on Receivables and CDOs

- Interest rate risk
- Hedged with interest rate swap (See Exhibits C-1 and C-2)

b. Match payment currencies on Receivables and CDOs

- Foreign exchange risk
- Hedged with currency swap (See Exhibit C-3)

c. Match credit rating on CDOs with Borrower's credit approval standards for customers (Lessees)

- Credit risk
- Hedged with credit default swap (See Exhibit C-4)

d. Lessees in different industries and locations

- Delinquency risk (slow pay)
- Liquidity Lender provide liquidity line of credit or

standby letter of credit

2. Types of securities

Securities sold by SPV have different characteristics

- a. Some rated by rating agencies (Moody's, Standard & Poors, Fitch)
- b. Some have high ratings (AAA) and some have low ratings (B-)
 - Some institutional investor (pension funds) only in AAA securities
 - Competition among rating agency to rate deals (Moody's, Standard & Poors, Fitch)
 - Compensation to rating agency paid by borrower
 - Possible conflicts of interest of rating agencies (The Big Short)
 - No rating, no deal
 - No deal, no compensation
- c. Loan originators retained no risk on mortgages sold
 - Lax underwriting standards
 - Minimal loan application and documentation
 - Liar's loans and no income
- d. Government policy encouraged increase in home ownership and "sub-prime" lending
 - Government mortgage agencies bought mortgage loans without recourse
- e. Glass-Steagall repealed allowing commercial banks to enter investment banking business
 - Commercial banks more heavily regulated because US Government (FDIC) provided deposit insurance
 - After repeal of Glass-Steagall, commercial banks took

on much greater risk

- “Proprietary trading” including buying CDOs for banks’ own account

f. Mark-to-market accounting required value of CDOs to be written down on banks’ balance sheets even if no default

- Failure to satisfy “capital adequacy” requirements for banks

g. Investment banks retained no risk on mortgaged packaged or CDOs sold

- CDO risks retained hedged by “shorting” investment banks’ own products
- Securities lawsuits or SEC investigations for failure to fully disclose risk or shorting activity

h. In issuing credit ratings, rating agency must also examine securitization structure, especially “bankruptcy remoteness” and “true sale”

- Accounting question
 - Removal of receivables from asset side of originator’s (PE’s) balance
 - Increases Return of Assets (ROA) and Return of Investment (ROI) and stock price
 - Accountants insist on true sale legal opinion before signing off on originator’s balance sheet
- Legal question
 - Law firms insist on “reasoned opinions” rather than “clean opinions”

3. Bankruptcy Remoteness and “Special Purpose Vehicles”

a. Entities formed as SPV minimize the likelihood they will file bankruptcy

- Outside directors must approve filing of bankruptcy petition

- SPV formed as a “trust” rather than a “corporation”
 - Business trusts eligible to file bankruptcy
 - Personal trusts not eligible
 - b. Scope of business activities may be limited by contract or by Article of Incorporation
 - c. Securitization in China achieves segregation of assets through PRC trust law rather than true sales to an SPV
4. True Sale Opinions and Recharacterization Risk.
- a. UCC 9-109 Official Comment 4

“Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of “security interest” (Section 1-201(37)) delineates how a particular transaction is to be classified. **That is left to the courts.**”
 - b. UCC 9-109 Official Comment 5

“Nothing in this section or any other provision of Article 9 prevents the **transfer of full and complete ownership of an account**, chattel paper, an instrument or payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of “security interest” in Section 1-201 **provides rules for distinguishing sales from those that create a security interest securing an obligation.** This Article applies to both types of transactions. The principal effect of this coverage is to apply this Article’s perfection and priority rules to these sales transactions.”
 - c. Factors Courts Consider in Determining Whether Assignment is “True Sale” (See Excerpts from True Sale Opinion in Exhibit D-2)

XII. Pre-delivery Aircraft Financing (See Exhibit E)

- A. What UCC category of collateral are Chinese Airlines’ rights under Aircraft Purchase Agreement?
 - Right to purchase Aircraft

- Right to take delivery of Aircraft
 - Right to take title to Aircraft
 - Right to manufacturer's warranties
- B. Is assignment from Chinese Airline to Chinese Leasing company outright assignment or security assignment (grant of a security interest)? Why is that important?
- C. Is the assignment from Chinese Leasing company to Chinese bank outright assignment or security assignment (grant of a security interest)? Why is that important?
- D. Assuming assignment is actually grant of a security interest, how should the Chinese Bank perfect its interest? Where should it file?
-

EXHIBIT A-1

(to Cross-Border Finance Seminar Outline)

WUXI SUNTECH CORPORATE STRUCTURE

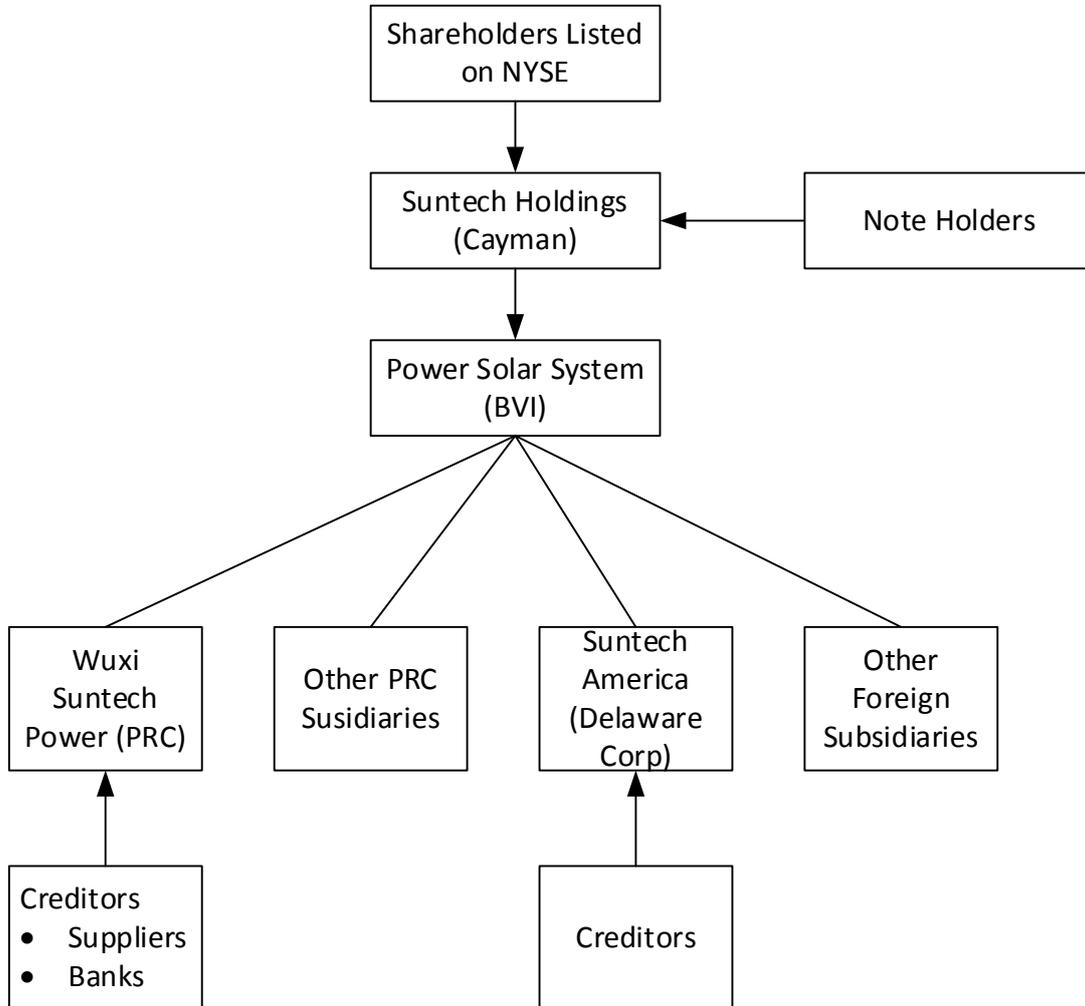


EXHIBIT A-2

(to Cross-Border Finance Seminar Outline)

WUXI SUNTECH BANKRUPTCY TIMELINE

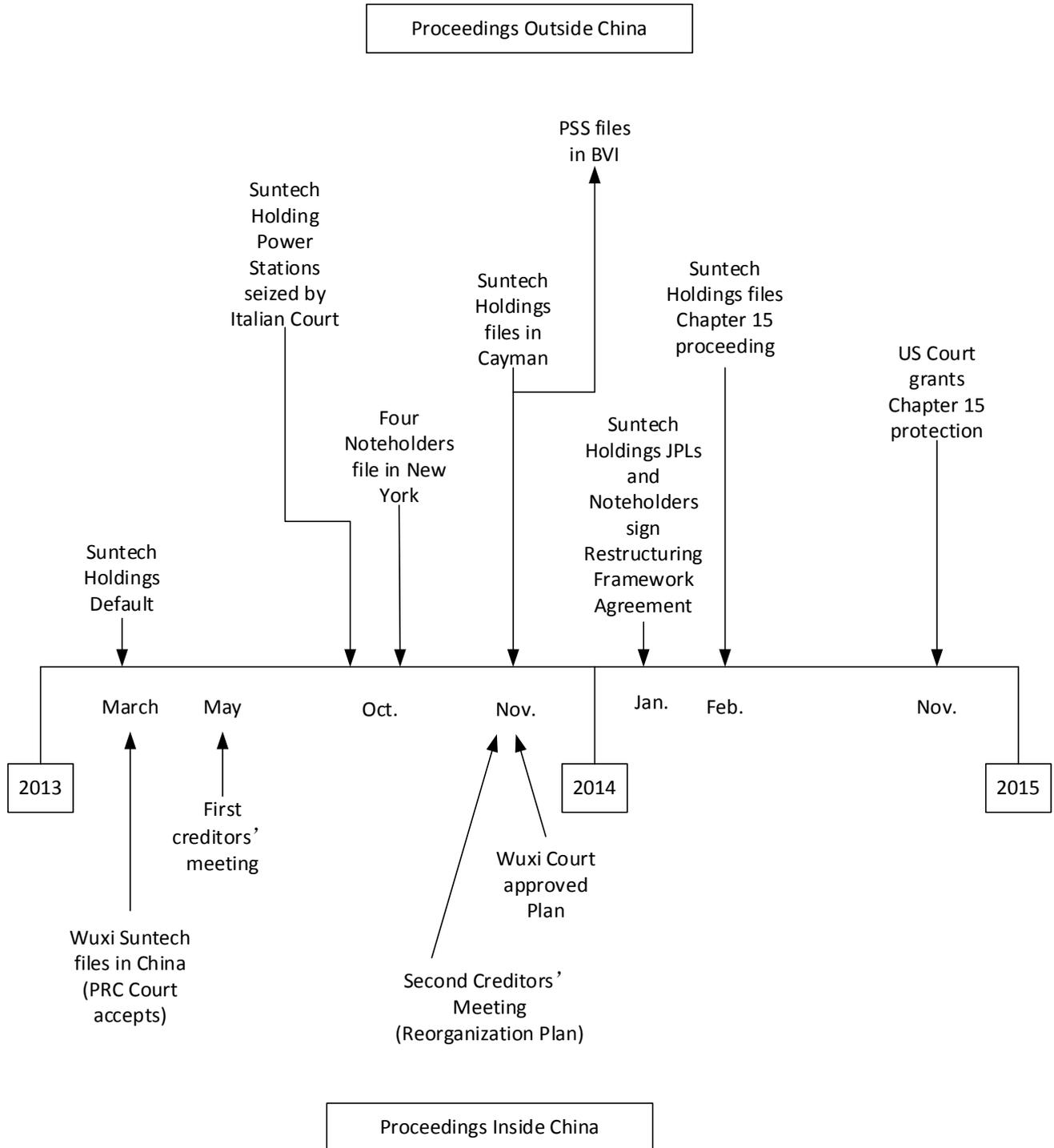


EXHIBIT A-3

(to Cross-Border Finance Seminar Outline)

Status UNCITRAL Model Law on Cross-Border Insolvency (1997)

This page is updated whenever the UNCITRAL Secretariat is informed of changes in enactment of the Model Law.

The UNCITRAL Secretariat also prepares yearly a document containing the Status of Conventions and Enactments of UNCITRAL Model Laws, which is available on the web page of the corresponding [UNCITRAL Commission session](#).

Legislation based on the Model Law has been adopted in 41 States in a total of 43 jurisdictions:

State		Notes
Australia	2008	
Benin	2015	(b)
Burkina Faso	2015	(b)
Cameroon	2015	(b)
Canada	2005	
Central African Republic	2015	(b)
Chad	2015	(b)
Chile	2013	
Colombia	2006	
Comoros	2015	(b)
Congo	2015	(b)
Côte d'Ivoire	2015	(b)
Democratic Republic of the Congo	2015	(b)
Equatorial Guinea	2015	(b)
Gabon	2015	(b)
Greece	2010	
Guinea	2015	(b)
Guinea-Bissau	2015	(b)
Japan	2000	
Kenya	2015	
Malawi	2015	
Mali	2015	(b)
Mauritius	2009	
Mexico	2000	
Montenegro	2002	
New Zealand	2006	
Niger	2015	(b)
Philippines	2010	

Poland	2003	
Republic of Korea	2006	
Romania	2002	
Senegal	2015	(b)
Serbia	2004	
Seychelles	2013	
Slovenia	2007	
South Africa	2000	
Togo	2015	(b)
Uganda	2011	
United Kingdom of Great Britain and Northern Ireland		
British Virgin Islands	2003	(a)
Gibraltar	2014	(a)
Great Britain	2006	
United States of America	2005	
Vanuatu	2013	

Notes

(a) Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

(b) Acte uniforme portant organisation des procédures collectives d'apurement du passif (OHADA), adopté le 10/09/2015 à Grand-Bassam (Côte d'Ivoire).

Disclaimer: A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

EXHIBIT B-1

(to Cross-Border Finance Seminar Outline)

CROSS-BORDER INVENTORY FINANCE LOAN STRUCTURE

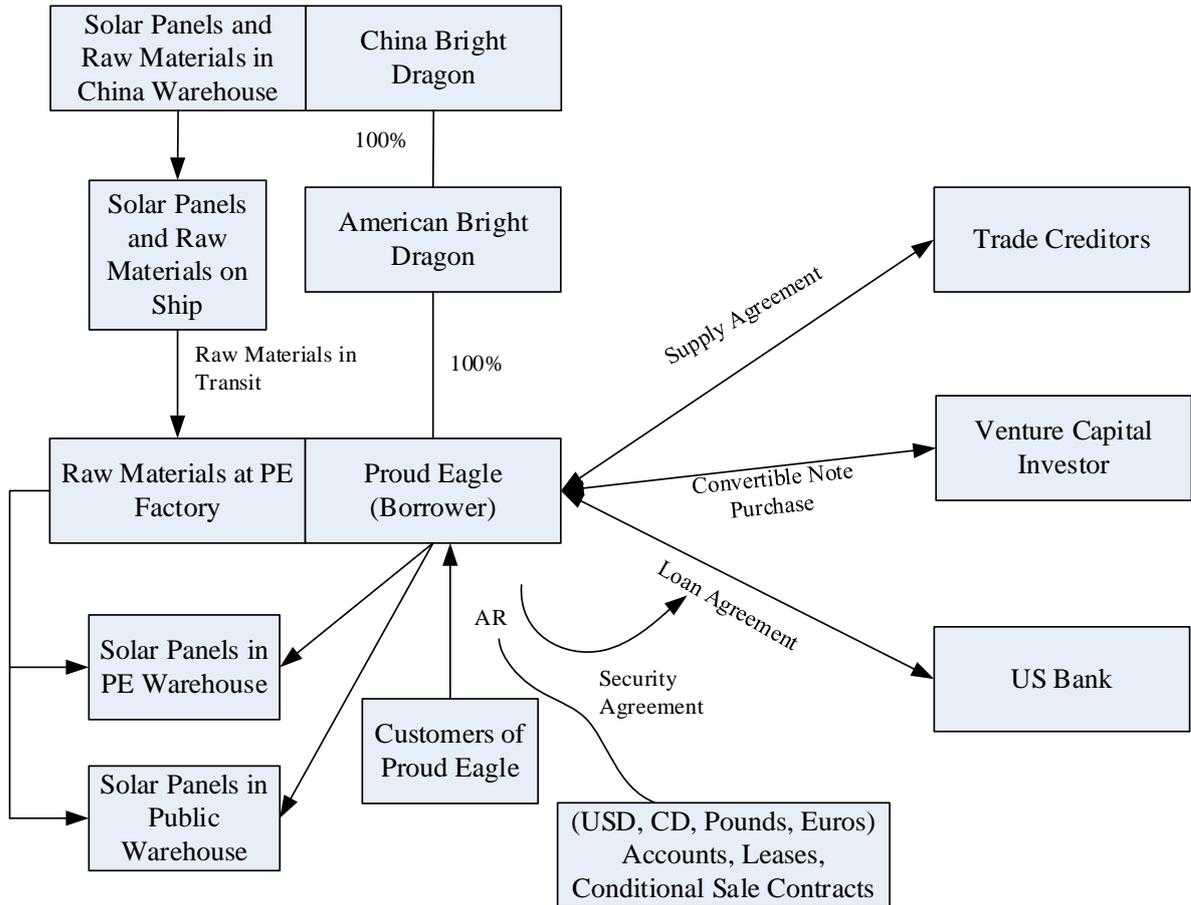


EXHIBIT B-2

(to Cross-Border Finance Seminar Outline)

UPSTREAM GUARANTY

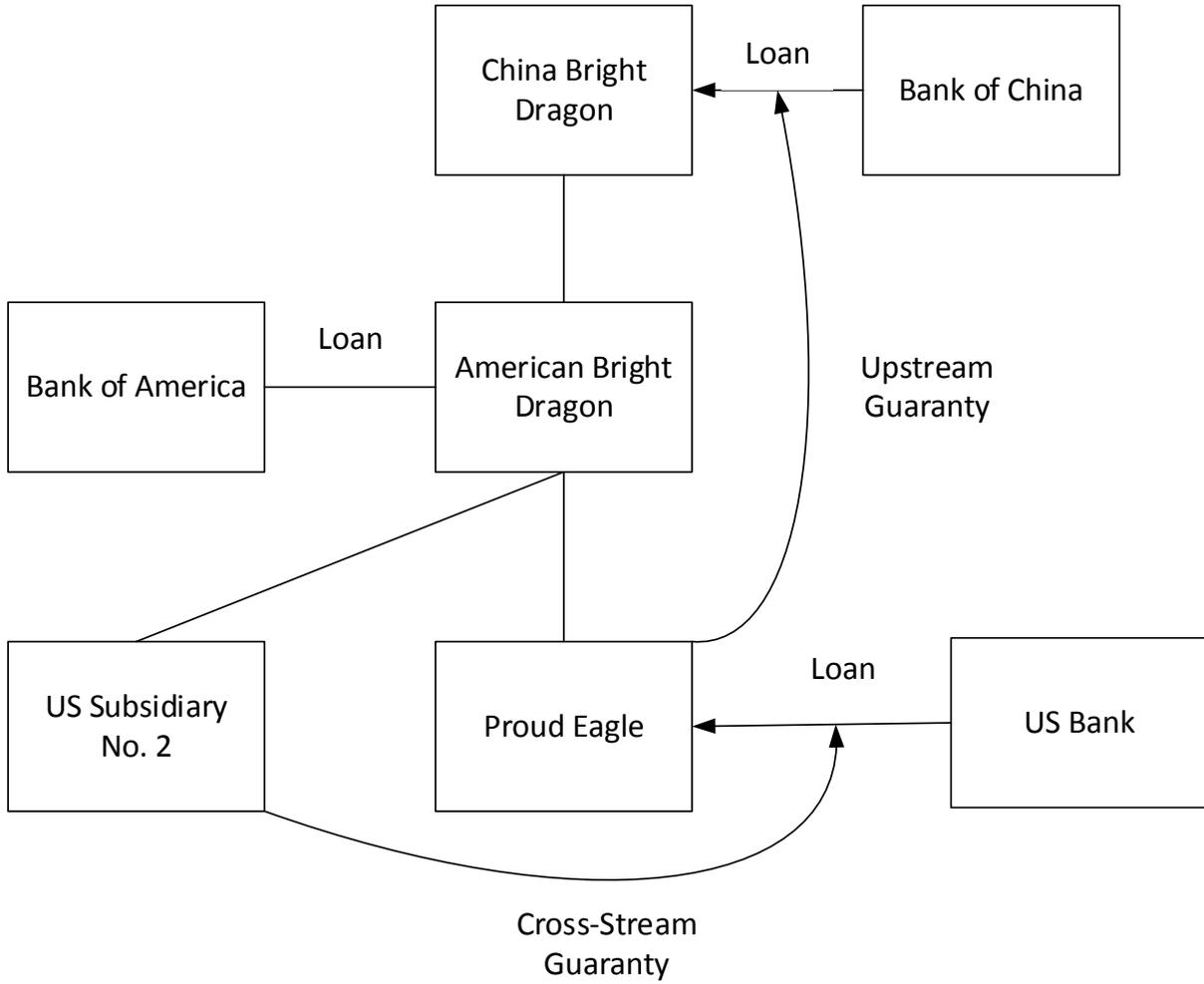
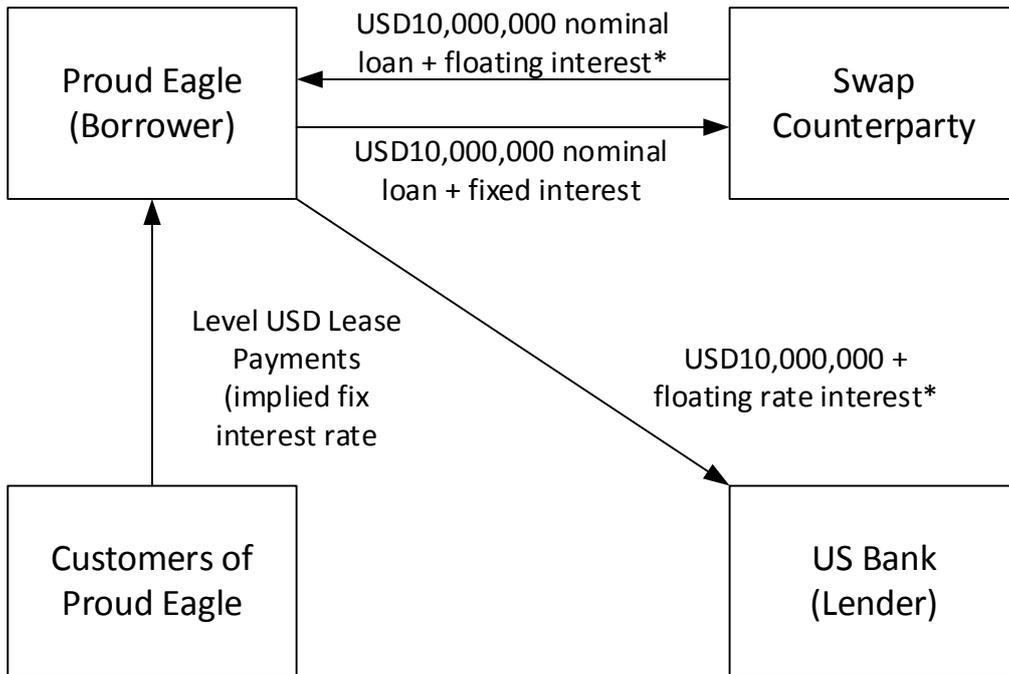


EXHIBIT C-1
(to Cross-Border Finance Seminar Outline)

SWAP CONTRACTS

Interest Rate Swaps

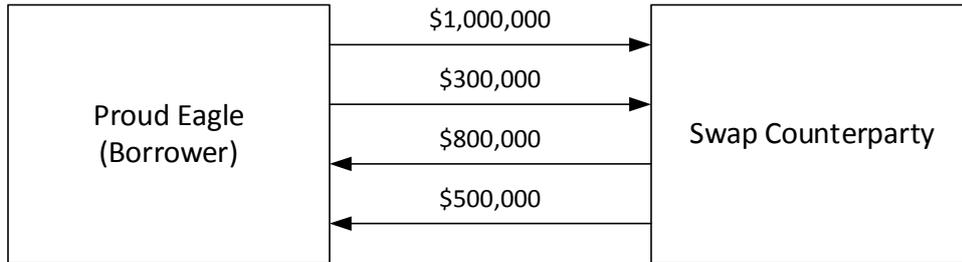


* Prime Rate or LIBOR

EXHIBIT C-2
(to Cross-Border Finance Seminar Outline)

SWAP CONTRACTS

Interest Rate Swaps
(Schedules under ISDA Master Agreement)



- * PE files bankruptcy: Net amount owing is \$0 (if netting allowed)
- ** Section 362(b)(6) of US Bankruptcy Code (exception from automatic stay to allow set off or netting)
- *** China BR Law has no exception
- **** Schedules under ISDA Master Agreement could include interest rate, currency and credit default swaps

EXHIBIT C-3
(to Cross-Border Finance Seminar Outline)

SWAP CONTRACTS

Currency Swap

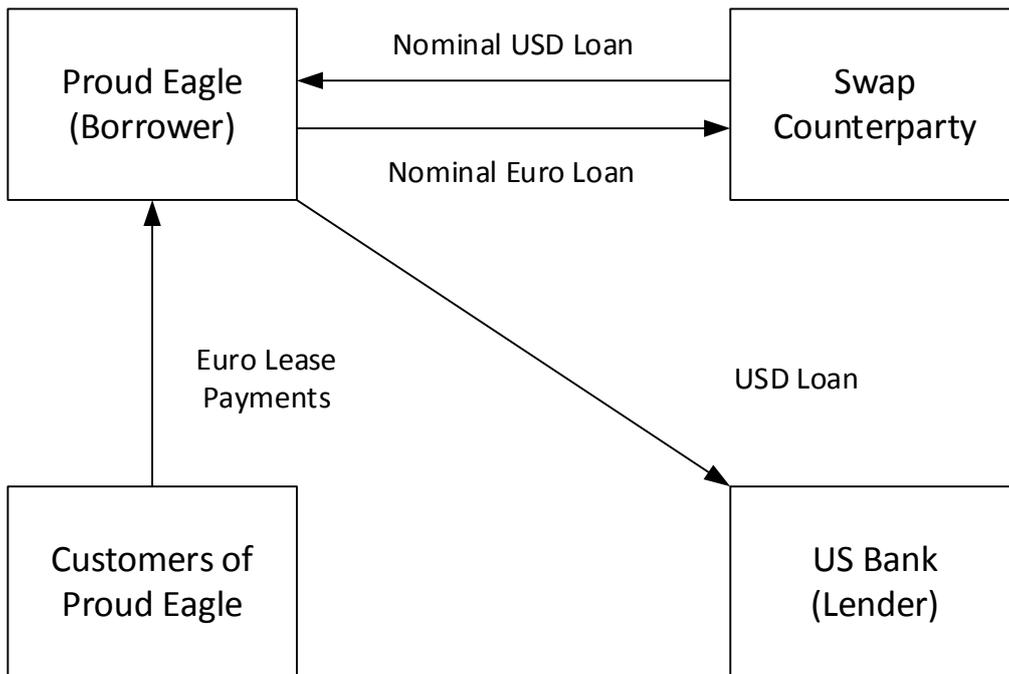


EXHIBIT C-4
(to Cross-Border Finance Seminar Outline)

SWAP CONTRACTS

Credit Default Swap

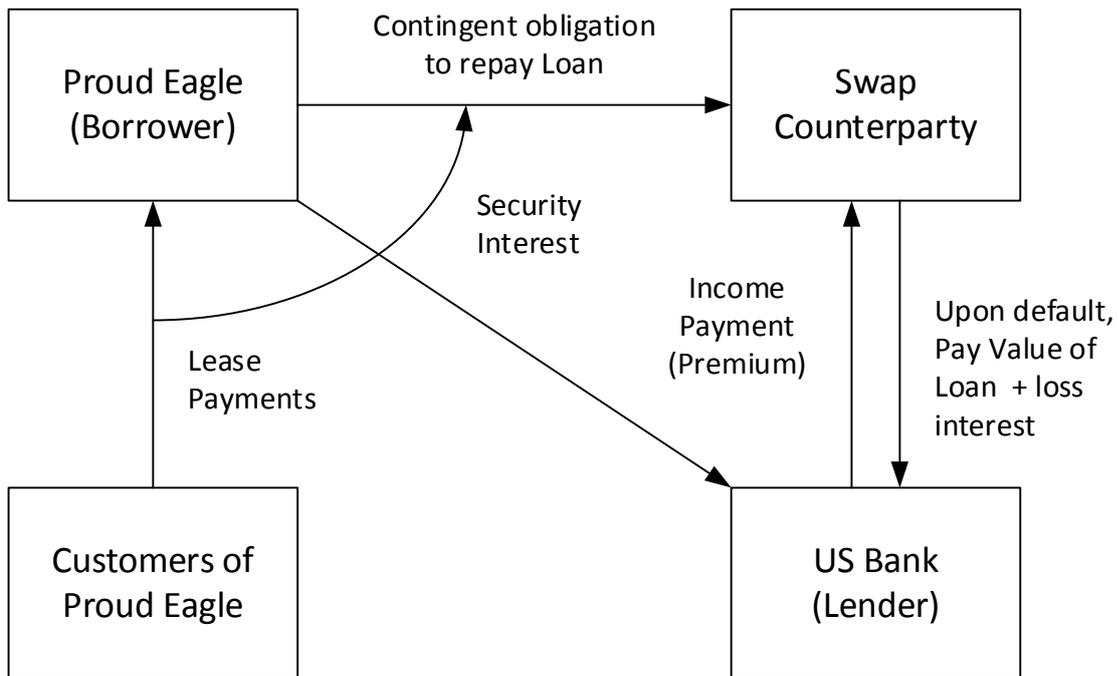


EXHIBIT D-2

(to Cross-Border Finance Seminar Outline)

EXCERPTS FROM TRUE SALE OPINION

_____, 2015

Re: Sale of Certain Receivables and Related Assets by Company to _____ Bank

Ladies and Gentlemen:

We have acted as counsel for _____, a Delaware corporation ("**Seller**"), in connection with the documentation related to the sale by the Seller to _____ ("**Purchaser**"), of certain Receivables and related assets pursuant to the Sale Agreement (as defined below). Capitalized terms used but not defined herein have the meanings set forth in the Sale Agreement.

We have based our opinion upon our review of the following documents, each dated as of the date of this opinion letter and on the officer's certificate attached as **Exhibit A** to this opinion letter (the "**Officer's Certificate**"):

1. The Sale Agreement between the Seller and the Purchaser (the "**Sale Agreement**"); and
2. The Escrow Agreement (the "**Escrow Agreement**") among the Seller (in its capacities **as seller and servicer** under the Sale Agreement), the Purchaser and _____ (the "**Escrow Agent**").

The foregoing items 1 and 2 are collectively referred to as the "**Reviewed Documents**."

Pursuant to the Sale Agreement, the Seller has agreed to transfer all of its right, title and interest in and to the Receivables (exclusive of the Retained Interest described below) and the other Sold Assets to the Purchaser.

[ELEMENTS OF TRUE SALE OPINION] You have requested our opinion as to whether, in the event of a bankruptcy case of Seller as debtor (a "**Bankruptcy Case**") under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**"), a court would determine that:

- (i) the sale and transfer pursuant to the Sale Agreement of the Sold Assets is a "true sale" of the Sold Assets to the Purchaser, rather than a grant of a security interest

in the Sold Assets for the purpose of securing a loan, **[SALE OR SECURED LOAN?]**and

- (ii) that, as a result of the determination set forth in clause (i), none of the Sold Assets sold and transferred in such transaction or the proceeds thereof would constitute property of the Seller's estate under Section 541(a)(1) of the Bankruptcy Code in a Bankruptcy Case, and the payment of collections and other proceeds of the Sold Assets (collectively, "**Collections**") to the Purchaser and/or its assigns would not be subject to the automatic stay under Section 362 of the Bankruptcy Code in such a Bankruptcy Case. **[SUBJECT TO AUTOMATIC STAY?]**

The law covered by the opinions expressed herein is limited to the laws of the State of New York (including the Uniform Commercial Code as adopted in the State of New York (the "**UCC**")) and the federal laws of the United States of America.

[LAW GOVERNING EACH ISSUE:

- **TRUE SALE: GENERAL NEW YORK CONTRACT AND PROPERTY LAW BECAUSE TRUE SALE IS "LEFT TO THE COURTS"**
- **AUTOMATIC STAY: US BANKRUPTCY LAW**
- **WHETHER FILING IS REQUIRED TO PERFECT SALE: NEW YORK UCC. OPINION DOES NOT COVER THIS ISSUE]**

We express no opinion as to whether: (a) a court may temporarily restrain the exercise of the Purchaser's rights to the Sold Assets;**[NON-BANKRUPTCY TRO IS SUBJECT TO DISCRETION OF COURT]** or (b) the Seller has any right, title or interest in or to any of the Sold Assets. **[OWNERSHIP OF SOLD ASSETS IS MIXED LAW AND FACT]**

I. Assumptions of Fact

In rendering our opinions, we have made no independent investigation of the facts referred to herein and have relied for the purposes of rendering this opinion letter exclusively on the Reviewed Documents enumerated above, the Officer's Certificate. **[LAWYERS RELY ON OTHER PEOPLE TO CONFIRM THE FACTS]**

It is our understanding that the relevant facts regarding the Transaction are as follows (all of which we have assumed to be true):

A. The Seller is a solar panel manufacturer and distributor that sells and leases solar panel to consumer and commercial customers ("**Customers**"). The Receivables sold by the Seller to the Purchaser pursuant to the Sale Agreement are a portfolio of such conditional sale contracts and leases.

B. Pursuant to the Sale Agreement, the Seller will sell to the Purchaser, and the Purchaser will purchase from the Seller, all of the Seller's right, title, and interest in and to the Receivables and the other Sold Assets. The Sold Assets consist of the following:

- (i) **the Receivables**,
- (ii) **the Receivables Contracts and any other agreements** executed and maintained by the Seller in connection therewith (including documents, if any, evidencing security interests granted to secure the Receivables or the obligation of the Obligor under the Receivables) and **all rights** and privileges of the Seller **accruing** thereunder **on and after the Cut-Off Date**, including the right to receive all Collections on the Receivables from the Obligors received on and after the Cut-Off Date and
- (iii) **all proceeds thereof**. The Purchase Price will be at “par” in that it is equal to the aggregate principal amount of the Receivables as of the Cut-off Date. **[100% FINANCING COMPARED TO 80% LENDING MARGIN]**

C. **On the Closing Date immediately prior to the sale of the Sold Assets, the Seller will be the sole owner and will have good title to all the Sold Assets** to be sold by the Seller to the Purchaser on such Closing Date pursuant to the Sale Agreement. Except pursuant to the exercise of the Mandatory Buyback Obligation or the Voluntary Buyback Right (each as defined below), Seller will acquire any right, title or interest in or to any of the Sold Assets or their proceeds after the sale of the Sold Assets to the Purchaser. **Appropriate financing statements under the Uniform Commercial Code will be filed in all relevant jurisdictions to evidence the sale or other transfer of the Sold Assets to the Purchaser** under the Sale Agreement and will identify Seller and Buyer as the seller and buyer, respectively, of the Sold Assets. Either there are **no other financing statements or similar instruments on file in any public office covering the Sold Assets** or any such financing statements or similar instruments will be terminated on or before the Closing Date. **[UCC COVERS WHETHER IT’S A SALE OR A SECURED LOAN]**

D. There is no agreement or provision in the Reviewed Documents or any other document or understanding under which Seller will retain any interest in the Sold Assets; however, **the Seller will service the Receivables for Purchaser** as provided in the Sale Agreement and will at times have possession or control of Collections until paid to the Purchaser.

E. Pursuant to the Sale Agreement, the Seller has the obligation (the “**Mandatory Buyback Obligation**”) to repurchase **Covered Receivables** (i.e., Receivables for which any **representation or warranty under the Sale Agreement is not true** and correct in any material respect), at the Seller’s sole discretion, for a Repurchase Price equal to the Principal Balance of such Loan plus all accrued and unpaid interest as of the applicable date of determination. **[RECOURSE FOR NON-CONFORMING LOANS]**

G. Pursuant to the Sale Agreement, the Seller has the right (the “**Voluntary Buyback Right**”) to repurchase Defaulted Receivables, at the Seller’s sole discretion, for a Repurchase Price equal to the Principal Balance thereof immediately before such Loan became a Defaulted Loan. **[RECOURSE FOR DEFAULTING LOANS]**

H. **The transfer of the Sold Assets by the Seller to the Purchaser is intended to be treated as a sale for legal . . . and bankruptcy purposes.** **[INTENT OF THE PARTIES]**The Sale Agreement provide:

Intention of the Parties. It is the intention of the parties hereto that the transfer and conveyance contemplated by this Agreement shall constitute an absolute sale of the Sold Assets from the Seller to the Purchaser and that the Sold Assets shall not be part of the Seller's estate or otherwise be considered property of the Seller in the event of the bankruptcy, receivership, insolvency, liquidation, conservatorship or similar proceeding relating to the Seller or any of its property.

Ownership of Sold Assets. On and after the Closing Date, Purchaser will be the sole owner of the Sold Assets for all legal purposes.

H. Other than the Mandatory Buyback Obligation and the Voluntary Buyback Right, the Seller has no right, option or obligation to purchase or repurchase any of the Sold Assets after the Closing Date, whether in the event of a breach of representations and warranties made with respect to the Sold Assets or otherwise. Neither the Seller nor any of its affiliates has any right to receive any "surplus" Collections from the Receivables.

II. ANALYSIS AND DISCUSSION OF LAW

Based on the foregoing Assumptions of Fact and the discussion set forth below, it is our opinion that in the event of a Bankruptcy Case, a court of competent jurisdiction that considers all of the relevant authority should hold that:

- (i) the Transaction is a true sale of the Seller's right, title and interest in and to the Sold Assets rather than a grant of a security interest therein for the purpose of securing a loan; and
- (ii) as a result of the determination set forth in clause (i), none of the Sold Assets transferred to the Purchaser prior to the commencement of a Bankruptcy Case of the Seller, or the Collections from such Sold Assets, would constitute property of the Seller's estate under Section 541(a)(1) of the Bankruptcy Code in a Bankruptcy Case, and the payment of Collections to the Purchaser and/or its assigns would not be subject to the automatic stay under Section 362 of the Bankruptcy Code in such Bankruptcy Case.

A. Background and Introduction.

If the Transaction is a true sale, then the Seller will not retain any legal or equitable interest in the Sold Assets and the Sold Assets would not be property of the Seller's bankruptcy estate in a Bankruptcy Case commenced after the transfer of the applicable Sold Assets. If the Transaction instead involves the creation of a security interest for the purpose of securing a loan, the Seller will retain an interest in the Sold Assets, which would be property of the Seller's bankruptcy estate in a Bankruptcy Case of the Seller.

Generally, the determination whether a debtor has a legal or equitable interest in specific property is governed by applicable state law. The UCC provides little guidance in determining whether a transfer constitutes a sale or creates a security interest for the

purpose of securing a loan. The UCC does not define the term “sale” in the context of a transfer of accounts or other rights to payment, **leaving it to the courts to determine** whether a transfer constitutes a sale or the creation of a security interest.

Because **courts have considered a variety of factors and tests** in determining whether a transfer is properly characterized as a sale, rather than a secured loan, and because **no controlling precedent exists for the proper characterization of the present Transaction**, our analysis is based upon case law decided under the laws of various jurisdictions that consider whether transfers of obligations for the payment of money constitute sales under bankruptcy law or the Uniform Commercial Code, as enacted in various states.

As an initial matter, many courts frame their analyses in terms of the intent of the parties to a transaction. Most courts view **the express characterization of a transfer only as one factor among many and look beyond the language used in a document to consider the actual substance of the transaction** and the actual conduct of the parties. Accordingly, although some decisions discuss the **characterization of transfers in terms of intent**, they tend to rely principally on an analysis of **a number of other factors** relating to the economic substance of the transaction to distinguish “true sale” transactions from those that create security interests.

The one **factor which regularly is given great weight** is whether the transferee has **“recourse”** against the transferor. The notion of “recourse” as used in many of the decisions comprehends both recourse relating to the failure of an obligor, as a result of the lack of creditworthiness of that obligor, to make payments owed under an obligation for the payment of money (**“Credit Recourse”**) and recourse that is unrelated to the collectability of an obligation for the payment of money owed or the creditworthiness of the obligors (**“Non-Credit Recourse”**). Common examples of Non-Credit Recourse include obligations arising out of the breach of transferor representations regarding enforceability of the transferred obligations and obligations of the transferor to indemnify the transferee for offsets and defenses relating to the transferor’s conduct which are claimed by obligors. Courts and other authorities tend to use the term “recourse” when discussing both Credit Recourse and Non-Credit Recourse, but address the difference between Credit Recourse and Non-Credit Recourse by references to the “nature” of the recourse. Where it is possible for us to determine what type of recourse is at issue, we have used these defined terms to clarify our discussion.

B. Discussion of the Law.

In *Major’s Furniture Mart, Inc. v. Castle Credit Corporation, Inc.*,¹ the court addressed **the respective rights of the parties under the Uniform Commercial Code to a “surplus” held by a transferee pursuant to a “sale of receivables agreement.”** The transferor had warranted that (i) the relevant receivables met criteria set forth by the transferee, (ii) the transferor had performed a credit check to verify that these criteria were satisfied, (iii) the receivables were fully enforceable legally, and (iv) the receivables were fully and timely collectible. In addition, the transferor was obligated (a) to indemnify the transferee out of a reserve account for losses resulting from customers’ failure to pay or any breach of warranty and (b) to repurchase any

¹ 602 F.2d 538 (3rd Cir. 1979). *Major’s* is often cited by other authorities as the leading decision regarding the classification of transfers as “true sales” or “secured loans.”

receivable after the customer was in default for more than sixty days. The purchase price for the receivables was calculated on the basis of their unpaid face amount, exclusive of interest, less a 15% “discount” and a 10% reserve against bad debts. Under the repurchase arrangement, the transferor had to repurchase defaulted obligations at a “‘repurchase’ price based on the balance due by the customer, plus any costs incurred by [transferee] upon default.” The *Major’s* court concentrated its analysis on the allocation of the risk of collectability between the transferee and the transferor. The court stated that Official Comment No. 4 to former Section 9-502(2) of the Uniform Commercial Code “make[s] it] clear to us that the presence of recourse in a sale agreement without more will not automatically convert a sale into a security interest The question for the court . . . is whether the *nature* of the recourse, and the true nature of the transaction, are such that the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale.” In arriving at its determination that the transaction was a financing transaction and not a sale, the *Major’s* court referred to the “extremely relevant factor of ‘recourse’” and quoted the District Court as follows: “[The transferee] only assumed the risk that the assignor itself would be unable to fulfill its obligations. **Guaranties of quality alone**, or even guarantees of collectability alone, **might be consistent with a true sale**, but [the transferee] attempted to shift all risks to [the transferor], and incur none of the risks or obligations of ownership.” Because the transferee of receivables incurred none of the risks or obligations of ownership due to the nature of the transferor's obligations, the *Major’s* court determined that the transaction was a secured borrowing rather than a true sale.

In *In re Federated Department Stores, Inc.*,² the court considered a receivables purchase agreement and concluded that, following the transfer of receivables by the transferor pursuant to that agreement, neither the transferor nor any of its creditors would “retain any ownership rights in or any liens or other encumbrances in or on the Receivables or the proceeds thereof . . . pursuant to Section 541 of the Bankruptcy Code or otherwise.” In its decision, **the Federated court cited the following reasons “under applicable law, including the Uniform Commercial Code”** for its conclusion that the transfer constituted a true sale:

- (a) [transferee] bears **risk that the receivables will prove uncollectible**;
- (b) [transferee] has a very **limited right of recourse** against [transferors] and this limited right of recourse is not related to any defaults in payment under the receivables by receivable obligors;
- (c) [transferors] have **no right to redeem or reacquire** the receivables transferred to [transferee];

² 1990 Bankr. LEXIS 2453 (Bankr. S.D. Ohio 1990). The *Federated* case does not appear to have been published in the Bankruptcy Reporter.

- (d) the **purchase price paid** by [transferee] to each [transferor] for the receivables is **approximately equal to the amount** that could generally be obtained by each of the [transferors] **in the marketplace** from unaffiliated entities in comparable transactions;
- (e) the amount paid by [transferee] for the receivables is **calculated pursuant to the formula** set forth in . . . the purchase agreement. . . which formula is similar to the purchase price formulas utilized by unaffiliated entities **in the marketplace** in comparable transactions;
- (f) although [transferors] are appointed by [transferee] as **collection agents** with respect to the receivables, the majority of collections will be made through **lock-box accounts under the control of [transferee]**;
- (g) **valid business reasons exist for not notifying receivable obligors** of the sale of their receivables by [transferors] to [transferee]; and
- (h) [transferee] and [transferors] **intend the purchases of the receivables to be true sales** and not lending transactions.

Notwithstanding the foregoing discussion, we call your attention to a contrary decision of the court in **Octagon Gas Systems v. Rimmer (In re Meridian Reserve)**,³ which has not been followed elsewhere. In *Octagon*, the Tenth Circuit United States Court of Appeals ruled that receivables sold by a debtor prior to its bankruptcy were property of the debtor's estate under Section 541 of the Bankruptcy Code, whether or not the buyer had complied with the filing provisions of former Article 9 of the Uniform Commercial Code. **Article 9, by its terms, applies to both (i) transactions intended to create a security interest in personal property, and (ii) any sale of accounts or chattel paper.** The *Octagon* court held that all provisions of former Article 9 were directly applicable to sales of accounts and chattel paper and that, for the purposes of the Bankruptcy Code, a sale of accounts or chattel paper was not distinguishable from a secured loan. The holding in *Octagon* is contrary to the views of other courts, including those in the

³ 995 F.2d 948 (10th Cir. 1993), *cert. denied*, 510 U.S. 993 (1993).

cases discussed above. *Octagon* has been often criticized. The argument contrary to the holding in *Octagon* is that while Article 9 requires certain steps to perfect a purchaser's interest in accounts and chattel paper, it does not thereby obscure the distinction between secured loans and sales of property. The **Permanent Editorial Board for the Uniform Commercial Code strongly criticized as erroneous the *Octagon* finding** that an account sold prior to bankruptcy was brought back into the bankruptcy estate. As a result of revisions to Article 9 subsequent to the *Octagon* decision, Article 9 now states that “[a] **debtor** that has sold an account, chattel paper, payment intangible, or promissory note **does not retain a legal or equitable interest** in the collateral sold.” UCC Section 9-318(a). The official comment to Section 9-318 further clarifies the purposes of the section:

Subsection (a) makes explicit what was implicit, but perfectly obvious, under former Article 9: **The fact that a sale of an account or chattel paper gives rise to a “security interest” does not imply that the seller retains an interest in the property that has been sold.** To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold.

Uniform Commercial Code Section 9-318, comment 2. As a result, although we are unaware of any judicial decision so holding, the current language of Article 9 strongly indicates that the rationale of the *Octagon* decision should not be followed by a court considering the issue today.

C. Analysis.

The following discussion constitutes (a) **our analysis of which attributes of the Transaction are indicative of a true sale and which are indicative of a secured loan**, and (b) **our conclusion as to how a court ultimately would characterize the Transaction**. In the absence of express guidance from the courts as to the relative importance of each factor discussed, we have reviewed the cited decisions and made judgments as to which factors courts have found to be most determinative. It is not certain that a court analyzing the Transaction would assign the same weight to various factors as did the courts in the case law cited in this opinion.

1. Risk Allocation.
2. Recourse.
3. Redemption.
4. The Parties' Characterization of the Transactions.
5. Additional Factors.

As a result of the transactions contemplated by the Reviewed Documents, **the Seller is not, and does not expect to become, a debtor of the Purchaser**. Except for the Voluntary Buyback Right and the Mandatory Buyback Obligation discussed above, Seller does not have any right or obligation under the Reviewed Documents to extinguish the Purchaser's rights in the Sold Assets.

Accordingly, these additional factors either indicate, or do not preclude the conclusion, that the Transaction would be classified as a “true sale” rather than a secured loan.

D. Conclusion.

Based on the foregoing, we conclude that, in the event of a Bankruptcy Case, **a court of competent jurisdiction considering all of the relevant authority should determine under applicable law that**

- (i) the Transaction is a “true sale” of the Sold Assets, rather than a grant of a security interest in the Sold Assets for the purpose of securing a loan and
- (ii) as a result of the determination set forth in clause (i), none of the Sold Assets transferred to the Purchaser prior to the commencement of a Bankruptcy Case of the Seller, or the proceeds of such Sold Assets, would constitute property of the Seller’s estate under Section 541(a)(1) of the Bankruptcy Code in a Bankruptcy Case, and the payment of Collections and other proceeds of such Sold Assets to the Purchaser and/or its assigns would not be subject to the automatic stay under Section 362 of the Bankruptcy Code in such Bankruptcy Case

III. CONCLUSION

The opinions expressed in this opinion letter are based on the analysis set out in this opinion letter, and the opinions may not be read in isolation from that analysis. **The opinions in this opinion letter are not a guaranty as to what any particular court would actually hold,** but an opinion as to the decision a court would reach if the issues were competently presented to it and the court followed existing precedent as to legal and equitable principles applicable in bankruptcy cases. In this regard, we note that legal opinions on bankruptcy and insolvency law matters unavoidably have inherent limitations that generally do not exist in respect of other issues on which opinions to third parties are typically given. These inherent limitations exist primarily because of **the pervasive equity powers of courts in a bankruptcy proceeding,** the overriding goals of reorganization and of distribution to the debtor’s creditors to which other legal rights and policies may be subordinated, the potential relevance to the exercise of judicial discretion of facts and circumstances arising in the future, and the nature of the bankruptcy process. The recipients of this opinion letter should take these limitations into account in analyzing the insolvency risks associated with the transactions described herein.

This opinion letter is rendered to you in connection with the Reviewed Documents and the Transaction set forth therein and is solely for your benefit. The opinions herein may not be relied upon by you for any other purpose, or relied upon by any other person, firm, corporation or other entity for any purpose, without our prior written consent. Further, we do not undertake or assume any responsibility with respect to either tax reporting or financial statements of you or your affiliates. We disclaim any obligation to advise you of any developments in areas covered by this opinion letter that occur after the date of this opinion letter.

Very truly yours,

EXHIBIT E

(to Cross-Border Finance Seminar Outline)

PRE-DELIVERY AIRCRAFT FINANCE

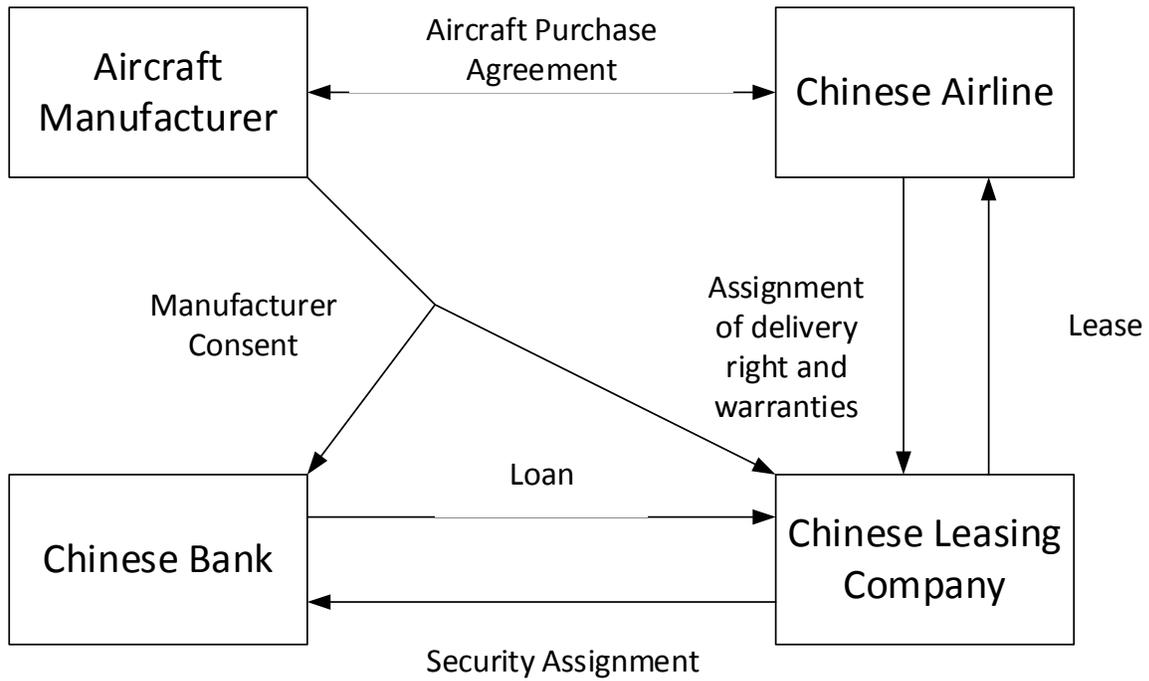
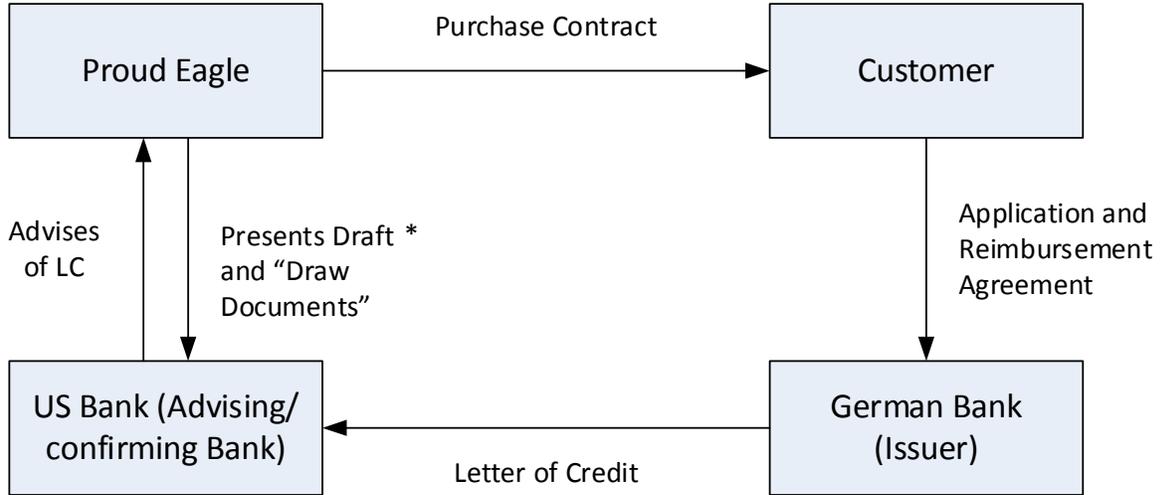


EXHIBIT F
(to Cross-Border Finance Seminar Outline)

COMMERCIAL LETTERS OF CREDIT

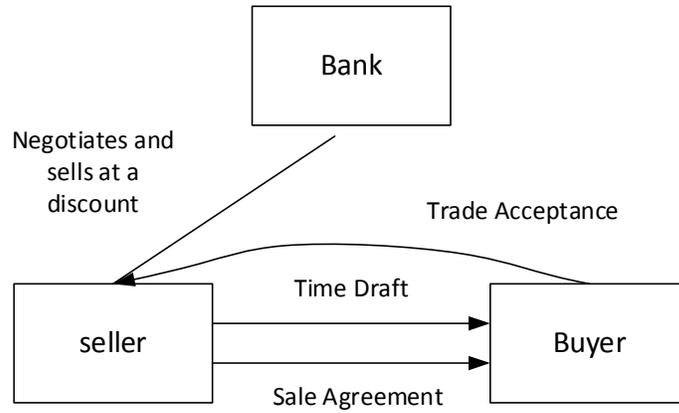


* Payable immediately upon presentment (sight draft) or
Payable on maturity date (time draft)
Sight drafts are honored by payment
Time drafts are honored by acceptance

EXHIBIT G

(to Cross-Border Finance Seminar Outline)

(Trade Acceptance)

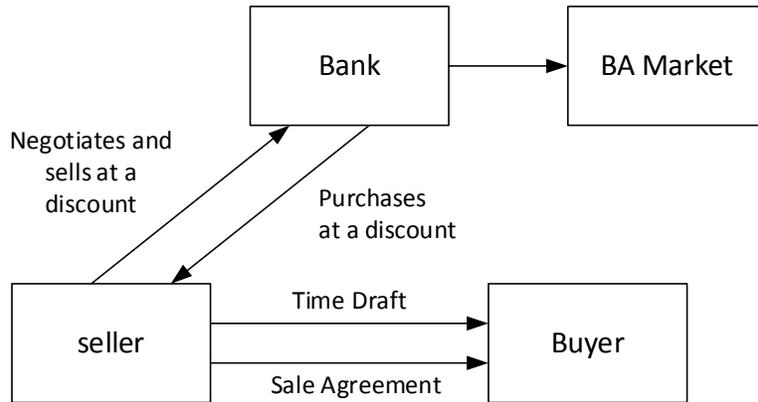


	<u>Buyer, Inc</u>	
	<u>\$100,000</u>	<u>February 1, 2016</u>
Accepted by Buyer, Inc.	On May 1, 2016	Pay to the order to
	Seller, Inc.	_____
	One Hundred Thousand U.S. Dollars	_____ Seller, Inc.

EXHIBIT H

(to Cross-Border Finance Seminar Outline)

(Banker's Acceptance)



	<u>Buyer, Inc</u>	
	<u>\$100,000</u>	<u>February 1, 2015</u>
Accepted by Bank, Inc.	On May 1, 2015	Pay to the order to
	Seller, Inc.	_____
	One Hundred Thousand U.S. Dollars	<u>Buyer, Inc.</u>